UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

DECISIONS OF THE SECRETARY OF AGRICULTURE

ISSUED UNDER THE

REGULATORY LAWS ADMINISTERED BY THE

UNITED STATES DEPARTMENT OF AGRICULTURE

(including Court Decisions)

VOL. 42 NO. 4

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PAGES 496–702

APRIL 1983

PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered by the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for a hearing. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register.

The principal statutes concerned are the Agriculture Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), the Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*) and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151–158).

The decisions published are numbered serially, in the order in which they appear herein, as "Agriculture Decisions". They may be cited by giving the volume and page, for illustration, 1 A.D. 472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D–578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in Agriculture Decisions.

Current court decisions involving the regulatory laws administered by the Department of Agriculture are published herein.

APRIL 1983

CUMULATIVE MATERIAL

A list of decisions reported and a subject index are maintained on a cumulative ca
dar year or volume basis and are published in each issue. An asterisk (*) indicates c
sions reported in this issue. In addition, under the Perishable Agricultural Commod
Act, reparation proceedings (including default), a list of decisions reported arrange
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POULTRY PRODUCTS INSPECTION ACT

*Current month April 1983 decision.

(No. 22,463)

In re: DR. WILLIAM M. SVENSEN. VA Docket No. 22. Decided March 14, 1983.

Failing to accurately report brucellosis test results-Revocation of veterinary accreditation

Respondent willfully failed to accurately report brucellosis test results, failed to accurately complete a brucellosis test record and intended to withhold blood specimens analyzed as positive for brucellosis. Therefore a respondent's veterinary accreditation was revoked.

Jaru Ruley, for complainant.
Terence A. O'Keefe, Aberdeen, South Dakota, for respondent.

Decision by John G. Liebert, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the revocation of the respondent's veterinary accreditation for violation of the standards for accredited veterinarians (9 CFR 161.2), hereinafter referred to as the standards, in accordance with the Rules of Practice in 9 CFR 162.1 *et seq.* and 7 CFR 1.130 *et seq.* (42 F.R. 10960 and 42 F.R. 743).

This proceeding was instituted by a complaint filed on July 12, 1982, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The Complaint alleged that on or about May 30, 1981, respondent conducted brucellosis tests on 48 head of cattle for one Gary Noltner of Aberdeen, South Dakota and failed to (a) accurately report the test results, (b) accurately complete the test record, (c) identify two brucellosis reactor animals, and that he intended to withhold two blood specimens analyzed as positive for brucellosis. In his answer, respondent waived an oral hearing and admitted all of the allegations contained in the complaint, except that he failed to identify two brucellosis reactor animals. Respondent alleged that the two animals were brucellosis suspects. Complainant agrees and, therefore, has deleted such paragraph from the proposed findings of fact herein. Respondent further requested that his veterinary accreditation not be revoked in view of the facts and his past good record.

Accordingly, the material facts alleged in the complaint, which, except for paragraph IV of the complaint which complainant has withdrawn, are admitted by respondent's answer, are adopted and set forth herein as the findings of fact, and this proposed decision is submitted pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139; 42 F.R. 745) applicable to this proceeding.

PERTINENT REGULATIONS

9 CFR 161.2 provides, in pertinent part, that:

An accredited veterinarian shall perform official duties subject to the supervision and direction of the Veterinarian-in-Charge and the State Animal Health Official and shall observe the following specific standards:

(b) An accredited veterinarian shall not sign any certificate, form, record or report, or permit such a certificate, form, record, or report to be used until, and unless he has ascertained that it has been accurately and fully completed clearly identifying the animal(s) or bird(s) to which it applies and showing the results of the inspection, test, or vaccination, etc., he has conducted. ... An accredited veterinarian shall not sign any certificate provided for by the Animal Welfare Act or its regulations and standards unless he has ascertained that the statements contained therein are complete, clear and accurate. The accredited veterinarian shall distribute copies of certificates, forms, records and reports, according to instructions issued to him by the Veterinarian in Charge or the State Animal Health Official.

(d) An accredited veterinarian shall perform official tests, inspections, treatments, and vaccinations and shall submit specimens to designated laboratories in accordance with Federal and State regulations and instructions issued to the accredited veterinarian by the Veterinarian-in-Charge or the State Animal Health Official, or both.

(f) An accredited veterinarian shall immediately report all diagnosed or suspected cases of diseases of livestock, birds, or poultry named in §71.3(a) and (b) of Part 71, Subchapter C of this chapter, to the Veterinarian-in-Charge or the State Animal Health Official, or both.

(h) An accredited veterinarian shall keep himself currently informed on Federal and State regulations governing the movement of animals and poultry, and on procedures applicable to disease control and eradication programs, including emergency programs, and on definitions, regulations, and standards under the Animal Welfare Act, and any legislation amendatory thereof, and on regulations under the Horse Protection Act of 1970, and any legislation amendatory thereof. He shall carry out all of his responsibilities under the applica-

ble Federal programs and cooperative programs in accordance with such regulations and instructions issued to him by the Veterinarian in Charge or the State Animal Health Official, or both.

FINDINGS OF FACT

1. Respondent, Dr. William M. Svensen, is an individual residing at 704 South Melgaard Road, Aberdeen, South Dakota 57401.

2. Respondent is now, and at all times material herein was, a doctor of Veterinary Medicine and an Accredited Veterinarian in the State of South Dakota, under the provisions of the regulations of Title 9, Code of Federal Regulations, Parts 160-162.

3. On or about May 30, 1981, respondent conducted brucellosis tests on 48 head of cattle owned by Mr. Gary Noltner, Aberdeen, South Dakota. Repondent failed to report the tests in accordance with Federal and State regulations and instructions issued to him, in that he did not report to the Veterinarian in Charge or the State Animal Health Official, that two of the 48 test eligible cattle had reacted positively to the brucellosis test.

4. On or about May 30, 1981, respondent, in connection with the brucellosis tests conducted on the 48 cattle, signed brucellosis test record number 3020014 and had the test form submitted to the Huron, South Dakota Cooperative Brucellosis Laboratory. Respondent failed to accurately complete the test record in that he omitted two test eligible cattle which had reacted positively to the brucellosis test.

5. On or about May 30, 1981, respondent conducted brucellosis tests on 48 head of cattle owed by Mr. Gary Noltner of Aberdeen, South Dakota. Respondent failed to submit specimens in accordance with Federal and State regulations and instructions, issued to him by the Veterinarian in Charge or the State Animal Health Official, or both, in that he intended to withhold two blood specimens analyzed as positive for brucellosis. Only 46 specimens were to be submitted to the Huron, South Dakota Cooperative Brucellosis Laboratory, along with the brucellosis test record listing 46 head of cattle analyzed negative for brucellosis. However, in Dr. Svensen's absence, an assistant submitted specimens for the total 48 cattle tested, including the specimens for the two cattle which Dr. Svensen had intended to withhold.

CONCLUSIONS

By reason of the facts contained in findings of facts 1, 2, and 3 herein, respondent has violated paragraphs (f) and (h) of the Standards (9 CFR 161.2(f) and (h)).

By reason of the facts contained in findings of facts 1, 2, and 4 herein, respondent has violated paragraphs (b) and (h) of the standards (9 CRF 161.2(b) and (h)).

By reason of the facts contained in findings of facts 1, 2, and 5 herein, respondent has violated paragraphs (d) and (h) of the Standards (9 CFR 161.2(d) and (h)).

Respondent's admission of all the allegations in the complaint, except paragraph IV of the complaint which has been dropped by the complainant, constitutes a waiver of hearing pursuant to section 1.139 of the Rule of Practice (7 CFR 1.139; 42 F.R. 745). It should also be noted that in his answer, respondent specifically waives a hearing. The actions of respondent in willfully failing to accurately report brucellosis test results, willfully failing to accurately complete the burcellosis test record, and for intending to withhold blood specimens analyzed as positive for brucellosis, constitute serious violations of the Standards for Accredited Veterinarians (9 CFR 161.2) and warrant the revocation of respondent's veterinary accreditation.

ORDER

The accreditation of respondent Dr. William M. Svensen under the provisions of the regulations in Title 9, Code of Federal Regulations, Parts 160-162, is hereby revoked.

This Decision and Order shall become final and effective without further proceeding thirty-five (35) days after service upon respondent, unless appealed to the Secretary within thirty (30) days after service upon respondent (7 CFR 1.142 and 1.145).

(No. 22,464)

In re: UTICA ZOOLOGICAL SOCIETY, d/b/a UTICA ZOO. AWA Docket No. 226. Decided March 31, 1983.

Standards and regulations-Consent

Respondent consented to the issuance of this order to cease and desist from violating the Act and the standards and regulations issued thereunder. Respondent was also ordered to remove all elk from its premises.

Alexandra Maravel, for complainant.
Respondent, *pro se*

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This is a proceeding under the Animal Welfare Act, 7 U.S.C. 2131 *et seq.*, hereinafter referred to as the "Act". A complaint issued by the Administrator of the Animal and Plant Health Inspection Service, hereinafter "APHIS", pursuant to the Act and the applicable Rules of Practice, 7 CFR 1.133(b)(1), .135, was served upon the respondent. This decision is entered pursuant to the consent decision provision of the Rules of Practice. 7 CFR 1.138.

The respondent admits the jurisdiction of the Secretary of Agriculture in this matter. Respondent waives a hearing and further procedure in this matter. The parties consent to the issuance of this decision agreed upon between them for the purpose of settling this matter.

FINDINGS OF FACT

1. Utica Zoological Society, herein "respondent", is incorporated in New York and maintains its principal place of business under the name "Utica Zoo" on Steele Hill Road, Utica, New York 13501.

2. At all times material herein respondent was a Class C licensee (license No. 21 CW) under the Act.

3. Respondent sold all elk which were exhibited on its premises in 1982. Respondent has not yet removed such elk from its premises, because removal during cold weather could harm the elk.

CONCLUSIONS

Respondent's admission of jurisdiction and the parties' consent to the issuance of this decision warrant the entry of such decision in this matter.

ORDER

It is hereby ordered that respondent, its agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued under it.

It is further ordered that respondent shall remove all elk from its premises as soon as practicable but in no case later than May 1, 1983.

This decision shall have the same force and effect as if entered after a full hearing. It shall be final upon issuance and effective in accordance with its terms.

MISCELLANEOUS ORDERS

(No. 22,465)

In re: MYRTLE KLEIST. AWA Docket No. 208. Order issued April 11, 1983

Order by John A. Campbell, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

Complainant's motion to dismiss the complaint in this proceeding is granted.

(No. 22,466)

In re: ROSE MARIE BROWN. AWA Docket No. 212. Issued April 29, 1983.

Order issued by William J. Weber, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

Complainant moves to dismiss the Complaint because Respondent has stated that she "decided not to renew my federal license". Letter from Respondent to Hearing Clerk filed April 21, 1983.

It should be and hereby is ordered that the Complaint is dismissed without prejudice.

(No. 22,467)

In re: TOMMY HOWELL and DON BAIN. HPA Docket No. 156. Decided March 29, 1983.

Sored horse-Civil penalty-Consent

Respondent Tommy Howell consented to the issuance of this decision and order in which he was assessed a civil penalty of $1,000 for showing a sored horse.

Alexandra Maravel, for complainant.
Robert L. Whitmire, Hendersonville, North Carolina for respondent.

Decision by Victor W. Palmer, Administrative law Judge.

CONSENT DECISION WITH RESPECT TO TOMMY HOWELL

This is a proceeding under the Horse Protection Act Amendments of 1976 (Pub. L. No. 94-360, §§ 3-10, 90 Stat. 915-21 (amending 15 U.S.C. 1821 *et seq.* (1970))), hereinafter referred to as the "Act." A complaint issued by the Administrator of the Animal and Plant Health Inspection Service pursuant to the Act and the applicable Rules of Practice (7 CFR 1.133(b)(1)), 1.135) was served upon respondent Tommy Howell. This decision is entered pursuant to the consent decision provision of the Rule of Practice (7 CFR 1.138).

Respondent Tommy Howell admits the jurisdiction of the Secretary of Agriculture in this matter and waives hearing and further procedure herein. Complainant and respondent Tommy Howell consent to the issuance of this decision agreed upon between them for the purpose of settling this matter.

For the purpose of settling this matter complainant states that it will not institute administrative or criminal proceedings with respect to the separate, alleged violation identified as case No. C-849 relating to an incident at the International Championship Horse Show on August 14, 1980.

FINDINGS OF FACT

1. Tommy Howell is an individual whose address is Box 57, Athens, Tennessee 37303 who at all times material herein trained a horse known as "Sneaky Sam," hereinafter referred to as "the horse."

2. On May 26, 1978, Tommy Howell showed the horse as Entry No. 160 in Class No. 4 at the Tri-State Championship Horse Show in Ooltewah, Tennessee.

3. In the opinion of veterinarians employed by the U.S. Department of Agriculture who examined the horse on May 26, 1978, the horse was sore when exhibited on that date as set forth in paragraph two above.

CONCLUSIONS

Respondent Tommy Howell's admission of jurisdiction and his agreement with complainant as to the issuance of this decision warrant the entry of such decision in this matter.

ORDER

A civil penalty of $1,000.00 is assessed against respondent Tommy Howel. Mr. Howell shall send a certified check or money order for that amount payable to the Treasurer of the United States to Alexandra Maravel, Marketing Division, Office of the General Counsel, Romm 2014-S, U.S. Department of Agriculture, Washington, D.C. 20250 within thirty (30) days after this decision becomes effective.

This order shall have the same force and effect as if entered after a full hearing. It shall be final upon issuance and effective upon service of the decision on the respondent.

(No. 22,468)

In re: BOYD HUDGINS. HPA Docket No. 150. Decided April 21, 1983.

Sored horse—Civil penalty—Consent

Respondent consented to the issuance of this decision and order in which he was assessed a civil penalty of $1,000.00 for exhibiting a sored horse.

Alexandra Maravel, for complainant.
Thomas C. Jones, Jr., Roswell, Georgia, for respondent.

Decision by John G. Liebert, Administrative Law Judge.

CONSENT DECISION

This is a proceeding under the Horse Protection Act Amendments of 1976, Pub. L. No. 94-360, §§ 3-10, 90 Stat. 915-21 (amending 15 U.S.C. 1821 *et seq.* (1970)), hereinafter referred to as the "Act." A complaint issued by the Administrator of the Animal and Plant Health Inspection Service pursuant to the Act and the applicable Rules of Practice (7 CFR 1.133(b)(1)), 1.135) was served upon respondent. This decision is entered pursuant to the consent decision provision of the Rule of Practice (7 CFR 1.138).

Respondent admits the jurisdiction of the Secretary of Agriculre in this matter and waives hearing and further procedure

herein. Complainant and respondent consent to the issuance of this decision agreed upon between them for the purpose of settling this matter.

For the purpose of settling this matter complainant states that it will not institute administrative or criminal proceedings with respect to the separate, alleged violations identified as Cases Nos. C-722 and C-723 relating to incidents at the Summer Classic Horse Show on July 28 and 29, 1978 as long as respondent is not reported at any time by complainant's agents or employees as having allegedly violated the Act during the period March 15–September 15, 1983. If respondent is so reported, complainant will institute proceedings with respect to Cases Nos. C-722 and C-723.

FINDINGS OF FACT

1. Respondent Boyd Hudgins is an individual whose address is Strickland Road, Rt. 3, Box 292A, Gainesville, Georgia 30501 who at all times material to this matter trained a horse known as "Midnite Georgia Girl," herein referred to as "the horse."

2. On August 5, 1978, respondent exhibited the horse as Entry No. 1675 in Class No. 6B at the 40th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee.

3. In the opinion of veterinarians employed by the U.S. Department of Agriculture who examined the horse on August 5, 1978, the horse was sore when exhibited on that date as set forth in paragraph two above.

CONCLUSIONS

Respondent's admission of jurisdiction and his agreement with complainant as to the issuance of this decision warrant the entry of such decision in this matter.

ORDER

A civil penalty of $1,500.00 is assessed against respondent. Respondent shall send a certified check or money order for $187.50 payable to the Treasurer of the United States to the Assistant General Counsel, Marketing Division, Office of the General Counsel, Room 2014-S, U.S. Department of Agriculture, Washington, D.C. 20250 on or before the last day of April 1983 and of each succeeding month until and including November 1983. If any one of the eight payments referred to above is postmarked later than the last day of the month in which that payment is due and payable, payment of the entire remaining balance of the $1,500.00 civil penalty is accelerated and shall be due and payable immediately.

This order shall have the same force and effect as if entered after a full hearing. It shall be final and effective upon issuance.

(No. 22,469)

In re: GLEN D. LOE and JUNIOR PIERCE. HPA Docket No. 181. Decided April 26, 1983.

Civil penalty—Consent

Respondent Pierce consented to the issuance of this decision and order in which he was assessed a civil penalty of $100.00.

Donald Tracy, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge

CONSENT DECISION WITH RESPECT TO RESPONDENT JUNIOR PIERCE

This is an administrative proceeding under the Horse Protection Act as amended (15 U.S.C. 1821 *et seq.*), instituted by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, charging that respondents have violated the Horse Protection Act, as amended. This consent order has been entered into between the parties under authority of the applicable Rules of Practice (7 CFR 1.138) following a hearing in Nashville, Tennessee, on January 28 and 29, 1982.

Respondent Pierce admits the jurisdictional allegations of the complaint and waives further procedure under applicable Rules of Practice (7 CFR Part 1). Mr. Pierce and the complainant consent to the issuance of this decision agreed upon between them for the purpose of settling this matter.

FINDINGS OF FACT

1. Mr. Junior Pierce is an individual whose mailing address is c/o Jack Mitchell Groceries Warehouse, Albertville, AL 35950, who at all times material herein trained "Delight's Black Prince" hereinafter referred to as "the horse."

2. On or about April 12, 1979, the horse was entered and exhibited as entry No. 173 class No. 11 at the Mississippi State Charity Horse Show in Jackson, Mississippi.

3. After showing in the above described class the horse was examined by United States Department of Agriculture veterinarians,

In the opinion of these veterinarians the horse was "sore" as that term is defined under the Horse Protection Act.

4. Mr. Pierce states that he did not know the horse was sore on the date in paragraph two above.

5. This consent decision does not constitute an admission of liability in this matter by Mr. Pierce.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of a consent order, the following order is issued.

ORDER

Respondent Junior Pierce is assessed a civil penalty of $100, which shall be payable by a certified check or money order to the Treasurer of the United States and forwarded to Donald A. Tracy, Office of the General Counsel, Room 2014 South Building, United States Department of Agriculture, Washington, D.C. 20250, within thirty (30) days from the date this order becomes effective. This order shall be effective upon service on Respondent Junior Pierce.

MISCELLANEOUS ORDER

(No. 22,470)

In re: BILLY GRAY, LARRY POTEAT and BRENDA POTEAT. HPA Docket No. 149. Order issued April 28, 1983.

Order issued by Dorothea A. Baker, Administrative Law Judge.

ORDER OF DISMISSAL

By reason of the "Notice of Appearance and Motion to Dismiss", filed April 26, 1983, the Complaint, filed January 28, 1980, is hereby dismissed with prejudice.

(No. 22,471)

In re: ROBERT M. BERRY, RONALD L. BERRY, ALI M. BERRY, and SALAH RABABEH. P&S DOCKET NO. 6052. Decided February 7, 1983.

Packer-Insufficient funds checks-Failure to pay, when due-Bonding requirement-Civil penalty-Default

Respondents were ordered to cease and desist from issuing insufficient funds checks, failing to pay when due for livestock and purchasing livestock for slaughter without filing and maintaining a reasonable bond or its equivalent. Respondents were assessed a civil penalty of $1,000.

Joanne I. Schwartz, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON BY DEFAULT
PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), hereinafter referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents have wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondents by the Hearing Clerk by certified mail. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondents have failed to file an answer within the time prescribed in the rules of Practice, and the material facts alleged in the complaint, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

FINDINGS OF FACT

1. (a) Robert M. Berry, Ronald L. Berry, Ali M. Berry, and Salah Rabebeh, doing business as Berry & Sons Islamic Slaughter

House, hereinafter referred to as respondents Berry & Sons, are partners with their principal place of business located in Detroit, Michigan. The mailing address is 2496 Orleans Street, Detroit, Michigan 48207.

(b) Respondents Berry & Sons are now, and at all times material herein were:

(1) Engaged in the business of buying livestock in commerce for purposes of slaughter; and

(2) A packer within the meaning of and subject to the Act.

(c) Respondents' Berry & Sons average annual purchases of livestock exceed $500,000.

2. Respondents Berry & Sons, in connection with their operations as a packer, on or about the dates and in the transactions set forth in paragraph II of the complaint, purchased livestock and in purported payment therefore issued checks which were returned unpaid by the bank upon which such checks were drawn because respondents Berry & Sons did not have sufficient funds on deposit and available in the account upon which such checks were drawn.

3. (a) Respondents Berry & Sons, in connection with their operations as a packer, on or about the dates and in the transactions set forth in paragraphs II and III(a) of the complaint, purchased livestock and failed to pay, when due, for such livestock purchases.

(b) Respondents Berry & Sons, in connection with their operations as a packer, on or about the dates and in the transactions set forth in paragraph III(b) of the complaint, purchased livestock and failed to pay for such livestock purchases.

(c) As of May 21, 1982, there remained unpaid in excess of $36,000.00 for livestock purchases.

4. (a) Respondents Berry & Sons were notified by certified mail that continued operations without a bond or its equivalent, as required by the Act and the regulations, would be in violation of section 202(a) of the Act and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondents Berry & Sons have engaged in the business of buying livestock in commerce for purposes of slaughter without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

(b) Respondents Berry & Sons presently do not have the required bond or its equivalent.

CONCLUSIONS

By reason of the facts found in Findings of Fact 2 and 3 herein, respondents Berry & Sons have violated the provisions of sections 202(a) and 409 of the Act (7 U.S.C §§ 192(a), 228b).

By reason of the facts found in Finding of Fact 4 herein, respondents Berry & Sons have violated section 202(a) of the Act (7 U.S.C. § 192(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, 201.30).

ORDER

Robert M. Berry, Ronald L. Berry, Ali M. Berry, and Salah Rababeh, individually, in partnership, directly or through any corporate or other device, shall cease and desist from:

1. Issuing checks in payment for livestock purchased without having and maintaining sufficient funds to pay such checks on deposit and available in the account from which such checks are to be paid;

2. Failing to pay, when due, the full purchase price for livestock; and

3. Purchasing livestock for slaughter without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondents Robert M. Berry, Ronald L. Berry, Ali M. Berry, and Salah Rabebeh are jointly and severally assessed a civil penalty in the amount of $1,000.00 which shall be payable by certified check or by money order to the Treasurer of the United States.

This Order shall be effective on the first day after the Decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this Decision becomes final without further proceedings 35 days after service hereof UNLESS appealed to the Secretary by a party hereto within 30 days after service, as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*). [This decision and order became final April 2, 1983.-Ed.]

(No. 22,472)

In re: JOHN BILLINGSLEY. P&S Docket No. 6083. Decided February 10, 1983.

Dealer—Market Agency—Failing to pay when due—Issuing insufficient funds checks—Insolvency—Suspension of registration—Default

Respondent was ordered to cease and desist from failing to pay when due, the full purchase price of livestock; and issuing insufficient funds checks. Respondent was suspended as a registrant for 12 months and thereafter until he demonstrates that he is no longer insolvent.

Allan Kahan, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), hereinafter referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent has wilfully violated the Act and regulations issued thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

FINDINGS OF FACT

(a) Joh Billingsley, hereinafter referred to as the respondent, is an individual whose mailing address is Box 3, Goreville, Illinois 62939.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account, and buying livestock on a commission basis; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce, and as a market agency to buy livestock on a commission basis in commerce.

2. (a) As of July 31, 1982, respondent's current liabilities exceeded his current assets. As of said date, respondent had current assets totalling approximately $92,474.38, and current liabilities

totalling approximately $1,045,673.20, resulting in an excess of current liabilities over current assets of $953,198.90.

(b) Respondent's current liabilities presently exceed his current assets.

3. By certified letter dated March 18, 1982, the respondent was notified of the requirements of section 409 of the Act, which requires, in part, that dealers purchasing livestock shall, before the close of the next business day following the purchase, deliver to the seller the full amount of the purchase price.

4. (a) The respondent, on or about the dates and in the transactions set forth in paragraph IV(a) of the complaint, purchased livestock in commerce, issued a check in purported payment for said livestock, and prior to the payment of said check, issued a stop payment order to the bank upon which the check was drawn.

(b) Respondent, in connection with the transactions set forth in paragraph (a) above, failed to pay, when due, for the livestock purchased.

5. (a) Respondent, on or about June 14, 1982, purchased 98 head of livestock at Bourbon Livestock Commission Company, and in purported payment therefor, issued a check for $69,105.47, dated July 13, 1982, which was returned unpaid by the bank upon which it was drawn because respondent did not have sufficient funds on deposit and available in the bank account upon which such check was drawn.

(b) Respondent, in connection with the transaction set forth in paragraph (a) above, failed to pay, when due, for the livestock purchased.

6. As of the date of issuance of this complaint, there remained unpaid $684,538.92 for livestock purchased by respondent in connection with his business as a dealer.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent's financial condition does not meet the requirements of the Act (7 U.S.C. § 204).

By reason of the facts found in Findings of Fact 4 and 5 herein, the respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

ORDER

Respondent, in connection with his business as a market agency or dealer, shall cease and desist from:

1. Failing to pay, or failing to pay, when due, the full purchase price of livestock; and

2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented.

Respondent is suspended as a registrant under the Act for a period of twelve months and thereafter until he demonstrates that he is no longer insolvent. When respondent demonstrates that he is no longer insolvent, a supplemental order will be issued in this proceeding, terminating the suspension after the expiration of the twelve month period.

This order shall be effective from the sixth day after the decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service hereof UNLESS appealed to the Secretary by a party hereto within 30 days after service, as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*). [This decision and order became final March 26, 1983.-Ed.]

(No. 22,473)

In re: ANDERSON COUNTY LIVESTOCK PRODUCERS, INC. P&S Docket No. 6073. Decided February 28, 1984.

Dealer—Market Agency—Bonding requirement—Suspension of registration—Civil penalty—Default

Respondent was ordered to cease and desist from engaging in business without filing and maintaining a reasonable bond or its equivalent. Respondent was suspended as a registrant under the Act and was assessed a civil penalty of $1,000.

Peter V. Train, for complainant.
Respondent, *pro se*.

Decision by John G. Liebert, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), hereinafter referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent has wilfully violated the Act and regulations issued thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

FINDINGS OF FACT

1. (a) Anderson County Livestock Producers, Inc., hereinafter referred to as respondent, is a corporation whose business mailing address is Route 1, Bethel Road, Clinton, Tennessee 37716.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of selling livestock in commerce on a commission basis; and

(2) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis, and as a dealer buying and selling livestock in commerce for its own account.

2. Respondent was notified that the trust fund agreement maintained to secure the performance of its livestock obligations under the Act was terminated, and that if it continued its livestock operations without adequate bond coverage or its equivalent, as required under the Act and the regulations, it would be in violation of section 312(a) of the Act and sections 201.29 and 201.30 of the regulations promulgated thereunder. Notwithstanding such notice, respondent has continud to engage in the business of a market agency, selling livestock in commerce on a commission basis, without filing and maintaining a reasonable bond or its equivalent, as required under the Act and the regulations.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, 201.30).

ORDER

Respondent Anderson County Livestock Producers, Inc., its officers, directors, agents, employees, successors and assigns, directly or

through any corporate or other device, in connection with its activities subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until it complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that it is in full compliance with such requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of One Thousand Dollars ($1,000.00).

This Order shall be effective from the sixth day after the Decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service hereof UNLESS appealed to the Secretary by a party hereto within 30 days after service, as provided in sections 1.142 and 1.145 of the Rules of practice (7 C.F.R. § 1.130 *et seq.*). [This decision and order became final April 8, 1983.-Ed.]

(No. 22,474)

In re: JAMES A. TINKLER and FLOYD STANLEY WHITE, d/b/a T & W CATTLE COMPANY and d/b/a COVINGTON SALES COMPANY. P&S Docket No. 6044. Decided March 28, 1983.

Dealer—Market agency—Bonding requirement—Civil penalty—Consent

Respondents consented to the entry of this decision and order in which they were ordered to cease and desist from engaging in business without filing and maintaining a reasonable bond or its equivalent. Respondents were assessed a civil penalty of $750.00.

Jory Hochberg, for complainant.
J. Houston Gordon, Covington, Tennessee, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), by a complaint filed by the Administrator, Packers and Stockyards

Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 C.F.R. § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the rules of Practice applicable to this proceeding (7 C.F.R. § 1.130 *et seq.*).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. James A. Tinkler, hereinafter referred to as respondent Tinkler, is an individual whose business mailing address is P.O. Box 794, Covington, Tennessee 38019.

2. Floyd Stanley White, hereinafter referred to as respondent White, is an individual whose business mailing address is P.O. Box 794, Covington, Tennessee 38019.

3. Respondents Tinkler and White are partners doing business as T & W Cattle Company, and as Covington Sales company.

4. In connection with their business operations as T & W Cattle Company, respondents:

(a) Were engaged in the business of buying and selling livestock in commerce for their own account; and

(b) Are registered with the Secretary of Agriculture as a dealer, buying and selling livestock in commerce for their own account, and as a market agency, buying livestock in commerce on a commission basis.

5. In connection with their operations as Covington Sales Company, respondents are:

(a) Engaged in the business of conducting and operating the Covington Sales company stockyard, a posted stockyard under the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock in commerce on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as a market agency selling livestock in commerce on a commission basis.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents, individually or through any partnership, corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondents are jointly and severally assessed a civil penalty in the amount of Seven Hundred and Fifty Dollars ($750.00).

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondents.

Copies of this decision shall be served upon the parties.

(No. 22,475)

In re: DONALD HAGEMAN, S&H HOGS, INC. AND S&H FEEDERS, INC. P&S Docket No. 5938. Decided March 29, 1983.

Dealer—Insolvency—Bonding requirement—Insufficient funds checks—Failure to pay when due—Billing and collecting based on false or incorrect weights and prices—Invoices and scale tickets, untrue and incorrect weights—Consignment, under false and fictitious names—Accounts and records—Suspension of registration—Civil penalty

Respondents were ordered to cease and desist from engaging in business while insolvent; engaging in business without filing and maintaining a reasonable bond or its equivalent; issuing insufficient funds checks; failing to pay, when due, the full purchase price of livestock; billing and collecting for livestock purchased on commission based on weights other than actual purchase weights; issuing invoices or scale tickets showing other than true and correct weights; billing and collecting from purchasers on the basis of false and incorrect weights; billing and collecting from principals on the basis of prices other than actual prices paid for livestock; consigning livestock for sale under false or fictitious names. Respondents were also ordered to maintain accounts and records which fully and correctly disclose all transactions subject to the Act. Respondent Hageman was suspended as a registrant under the Act for 90 days and thereafter until he complies with the bonding requirements and until he demonstrates that he is no longer insolvent. Respondent Hageman was assessed a civil pantlty of $5,000.

Roberta Swartzendruber, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).[1] An initial decision and order was issued on January 17, 1983, by Chief Administrative Law Judge John A. Campbell ordering respondents to cease and desist from specified practices, requiring respondents to maintain adequate accounts and records, suspending respondent Hageman as a registrant for 90 days and thereafter until he is solvent and complies with the bonding requirements, and assessing a $5,000 civil penalty against respondent Hageman.

On March 8, 1983, respondents appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[2] Following complainant's response, the case was referred to the Judicial Officer for decision on March 25, 1983.

Based upon a careful consideration of the entire record, the initial decision and order is adopted as the final decision and order in this case, with trivial changes. Additional conclusions by the Judicial Officer follow Chief Judge Campbell's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*, hereinafter referred to as the "Act"), instituted by a complaint filed on September 17, 1981, by the Acting Administrator of the Packers and Stockyards Administration. The complaint was amended on December 30, 1981, to reflect a change in one of the respondents named in the complaint, from an unincorporated to an incorporated entity.

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[1] *See generally* Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, Agricultural Law, ch. 3 (1981 and May 1982 Supp.), and Carter, "Packers and Stockyards Act," in 10 Harl, Agricultural Law, ch 71 (1980)

[2] The career position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app., at 764 (1976). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

Respondent Donald Hageman is registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

The complaint alleges that respondent Donald Hageman, at all times material herein, was engaged in the business of buying and selling livestock in commerce for his own account and on a commission basis, and was doing business as S&H Hogs and conducting business through S&H Feeders, a corporation he managed, directed and controlled. On May 18, 1981, S&H Hogs was incorporated, but continued to operate under the direction and control of respondent Hageman.

The complaint alleges that respondent Hageman engaged in a series of business activities in 1980 in violation of the Act and regulations issued thereunder. More specifically, the complaint alleges that respondent Hageman's financial condition does not meet the requirements of the Act, that respondent Hageman engaged in business as a dealer, while insolvent, and that he failed to maintain an adequate bond or trust fund agreement to secure the performance of his livestock obligations. Further, the complaint alleges that the respondents issued insufficient fund checks for livestock purchases, that the respondents failed to pay the full purchase price of livestock when due, cites transactions where respondents charged and collected amounts from their principals for livestock based on false weights and false prices and issued scale tickets purporting to show the true actual weight of certain livestock when, in fact, such livestock was never weighed by respondents. Finally, the complaint charges the respondents with consigning their own livestock to various auction markets under false and fictitious names.

Respondents filed an answer to the complaint on October 31, 1981, stating respondent Hageman was in the process of selling his S&H hog operation, reducing his hog buying, and denying any wrongdoing, stating there was never an agency relationship with any packer; that he delayed paying for livestock because those who purchased from him did not pay on time and that use of fictitious names was a common practice and was not a violation of the Act or regulations.

The respondents filed an amended answer on May 17, 1982, in which respondent Hageman admitted doing business as an individual and as S&H Hogs but stated S&H Feeders was not under his control. Respondent Hageman further admitted being registered with the Secretary of Agriculture as a dealer from July 31, 1980, through September 30, 1980, denied any packer agency relationship, stating any such agency agreement would be a violation of the

statute of frauds and thus unenforceable. The amended answer defended the use of fictitious names as a common practice. In addition, respondents maintained that since they had received no complaints concerning the transactions cited as violations, the Administrator was without jurisdiction.

On June 3-4, 1982, an oral hearing was held in Pierre, South Dakota. Respondents were representedby Charles Poches, Jr., Fort Pierre, South Dakota. Roberta Swartzendruber, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., appeared as attorney for complainant. At the close of the hearing, the time was fixed for the filing of briefs. One brief was filed by complainant.

FINDINGS OF FACT

I.

1. Donald Hageman, hereinafter referred to as respondent Hageman, is an individual whose principal place of business is located at Hoven, South Dakota, and whose business mailing address is Hoven, South Dakota 57450.

2. Respondent Hageman, at all times material herein, was doing business as respondent S&H Hogs which was incorporated May 18, 1981, after the initial complaint was issued.

3. Respondent Hageman, at all times material herein, conducted business through respondent S&H Feeders, Inc., which he coincorporated and publicly represented as "Bonded Order Buyers for Western Feeder Cattle."

II.

4. Respondent Hageman, at all times material herein, was engaged in the business of buying and selling livestock in commerce for his own account and on a commission basis. Said respondent was registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

5. Respondent Hageman was sent and did receive letters dated January 9, 1980, and March 26, 1980, from the Packers and Stockyards Administration notifying him that the amount of his Trust Fund Agreement was not adequate to secure the performance of his livestock obligations under the Act, and that if he continued to operate without obtaining adequate trust fund or bond coverage, he would be in violation of the act and regulations. Despite these notifications, respondent Hageman continued to engage in the business of a dealer, buying and selling livestock in commerce for his own account without maintaining either an adequate trust fund agreement or adequate bond.

III.

6. As of July 31, 1980, respondent Hageman had current liabilities totalling $272,331.76, and current assets totalling $222,967.12, resulting in an excess of current liabilities over current assets of $49,364.64.

7. As of September 30, 1980, respondent Hageman had current liabilities totalling $205,263.97, and current assets of $134,671.36, resulting in an excess of current liabilities over current assets of $70,592.61.

8. Respondent Hageman, during the period from July 31, 1980, through September 30, 1980, engaged in the business of a dealer buying and selling livestock in commerce for his own account, notwithstanding the fact that his current liabilities exceeded his current assets during this period.

IV.

9. Respondents, in connection with their operations as a dealer subject to the Act, on or about the dates and in the transactions set forth below, purchased livestock and in purported payment therefor, issued checks which were returned unpaid by the bank upon which they were drawn because respondents did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

DATE OF PURCHASE	FROM WHOM PURCHASED	NO. OF HEAD	AMOUNT OF CHECK
6/30/80	Gettysburg Livestock Exchange	161	$91,378.25
7/7/80	Gettysburg Livestock Exchange	82	40,694.78
8/18/80	Gettysburg Livestock Exchange	59	34,840.77
8/25/80	Gettysburg Livestock Exchange	169	9,017.70
6/27 /80	Ft. Pierre Livestock Auction	47	22,962.56

10. Respondents, in connection with their operations as a dealer, on or about the dates and in the transactions set forth in Finding of Fact 9 above, failed to pay, when due, the full purchase price of such livestock.

V.

11. Respondents, during the period June 1980, through August 1980, entered into agreements to purchase livestock as the agent for certain principals and agreed to transfer such livestock to their principals at a price based upon respondents' actual purchase weights with an agreed buying commission as respondents' compensation.

12. Notwithstanding this representation to, or agreement and understanding with their principals to charge a price for livestock based on respondents' actual purchase weights, respondents added an arbitrary number of pounds to the weights at which respondents had purchased such livestock by issuing sales invoices to their principals showing false and incorrect weights and by charging a price to and receiving payment from their principals based upon the false and incorrect weights.

On June 6, 1980, respondents purchased 41 head, with an actual purchase weight of 25,190 pounds from Ft. Pierre Livestock Auction. On June 7, respondents sold these 41 head to Ray Van Well at a sale weight of 26,480 pounds, for an added weight of 1,290 pounds.

On August 14, 1980, respondents purchased 71 head, with an actual purchase weight of 50,105 pounds from Napoleon Livestock Auction. On August 18, 1980, respondent sold these 71 head to Merle Hageman at a sale weight of 51,090 pounds, for an added weight of 985 pounds.

VI.

13. Respondents, during the period January 1980, through June 1980, in connection with the purchase of livestock on an agency basis, prepared scale tickets purporting to represent the weight of the livestock purchased when, in fact, such livestock had not been weighed by respondents. In connection with such transactions, respondents billed and collected from their principals on the basis of such scale tickets.

VII.

14. Respondents, during the period January 1980, through June 1980, entered into agreements to purchase livestock as agents for certain principals and to pass on to their principals the original purchase price, with an agreed buying commission as compensation.

15. Notwithstanding this representation to or agreement and understanding with their principals to charge the original purchase price plus agreed commission, respondents arbitrarily increased prices over the prices actually paid for the livestock and issued invoices to their principals showing the falsely increased prices, and charged and collected payment from their principals on the basis of these falsely increased amounts as more fully detailed in paragraph IX of the Complaint.

VIII.

16. Respondents, during the period June 1980, through July 1980, consigned their own livestock to various auction markets under false and fictitious names, thus failing to show the respondents as the sellers of the livestock as more fully detailed in paragraph X of the Complaint.

CONCLUSIONS

By reason of the Findings of Fact, it is concluded that:

1. Respondent Hageman conducted business through S&H Feeders, Inc.;

2. Respondent Hageman, during the period January 1980, through September 1980, continued to engage in the business of a dealer, after notice, without maintaining either an adequate trust fund agreement or an adequate bond;

3. Respondent Hageman engaged in the business of a dealer, during the period July 31 through September 30, 1980, notwithstanding the fact that his current liabilities exceeded his current assets;

4. Respondents in their operations as a dealer during the period June 27, 1980, through August 25, 1980, purchased livestock and in purported payment therefor issued checks which were returned unpaid and thus failed to pay, when due, the full purchase price of such livestock;

5. Respondents, in violation of agreements with their principals, charged and collected a price for livestock based on weights which were increased above respondents' actual purchase weights for such livestock;

6. Respondents, in connection with their purchase of livestock on an agency basis, issued scale tickets for livestock which had not actually been weighed, and then billed and collected from their principals on the basis of such scale tickets;

7. Respondents, in violation of agreements with their principals, charged and collected prices from them which were increased over the original prices respondents actually paid for such livestock; and

8. Respondents consigned their own livestock to various auction markets under false and fictitious names thus failing to show the respondents as the sellers of the livestock.

It is concluded further that:

The actions of respondents, as noted in 2 through 8 above, were in willful violation of the Act (7 U.S.C. 204, 213(a), 221, and 228b).

I.

S&H FEEDERS

The amended answer admitted that Donald Hageman conducted business as S&H Hogs, but denied that S&H Feeders, Inc., is controlled by Donald Hageman. At the hearing, it was established that no operating account existed for S&H Feeders and reimbursement to such entity for hogs was placed in the S&H Hogs' account (Tr. 195-198, 206-210).

However, the record evidence establishes that respondent Hageman was actively conducting business as S&H Feeders, Inc., during the January 1980, through September 1980, period. He was one of S&H Feeders two incorporators. He regularly held himself out to the livestock industry as S&H Feeders, Inc., by extensive use of S&H Feeders forms and invoices. These forms and invoices proclaimed S&H Feeders, Inc., as being "Bonded Order Buyers for Western Feeder Cattle." Further, those with whom he did business recognized S&H Feeders, Inc., as the entity with which they were doing business as evidenced by the fact that they often made S&H Feeders, Inc., the payee on checks destined for respondent Hageman who, in turn, accepted them in the normal course of business. (TR. 103-106, 206-210).

Thus the record evidence establishes that Donald Hageman conducted business through S&H Feeders, Inc., and directed, controlled and managed the corporate entity.

II.

TRUST FUND AGREEMENT OR BOND

On January 9, 1980, and again on March 26, 1980, the complainant notified respondent Hageman that the amount of his trust fund agreement was not adequate based on the volume of business he was conducting. However, Respondent did not increase his trust fund or bond coverage and continued to operate as a dealer buying and selling livestock in commerce.

Through his entities, respondent Hageman purchased over $2,400,000 worth of livestock in the June 1980–August 1980 period with a trust fund amount of only $5,000.00, some $50,000.00 short of the amount required for such a volume of business. (Tr. 38-39, Exhibit Cx 5).

The requirement that a reasonable bond be maintained by every dealer is a requirement imposed by the Act and the regulations. (7 U.S.C. § 204; 9 C.F.R. §§ 201.29, 201.30). It has been held that operation without an adequate bond or its equivalent is a violation of

section 312(a) of the Act (7 U.S.C. § 213(a)), as an unfair, unjustly discriminatory or deceptive practice or device. *In re: Owen Monroe County Feeder Association, Inc.*, 25 AD 766 (1966).

Respondent Hageman, and through the respondent entities, operated in willful violation of the Act and the regulations by continuing to operate subject to the Act after being notified of the need to increase his trust fund agreement. *In re: Edzards*, 37 A.D. 1880, 1886 (1978); *In re: Schubert*, 30 A.D. 933 (1971).

Respondent urges that his business has decreased since 1980, and hence, the need for a higher bond is no longer a problem. (Tr. 445-446, 451-452, 519-520). Respondent's present situation does not excuse his failure to obtain the required bond in 1980, and his present bonding needs can be ascertained upon audit by the Packers and Stockyards Administration.

III.

INSOLVENCY

The record evidence discloses that respondent Hageman had current liabilities exceeding current assets on July 31, 1980, of $49,364.64 and current liabilities exceeding current assets of $70,592.61 on September 30, 1980.

Although the provisions of the Act do not define insolvency, the established test for insolvency used by the Secretary under the Act is whether current liabilities exceed current assets. The respondent contends that since fixed assets were not included in the determination of his financial condition, this test is in error. However, the appropriateness of the current ratio test has been consistently upheld. *In re: W.I. Bowman*, 23 A.D. 1074, 1083-1084 (1964), *aff'd sub nom., Bowman v. United States Department of Agriculture*, 363 F.2d 81 (CA 5, 1966); In the *Bowman* case, the Fifth Circuit Court of Appeals held at page 85:

> Having in mind the remedial purposes of the Act, we hold that the test used for determining solvency or insolvency under the circumstances here was reasonable. A financial status where current assets exceed current liabilities would be the *sine qua non* of prompt payment.

The respondents also attempted to refute the proof of insolvency by pointing to the fact that insolvency was shown only on two dates, July 31, 1980, and September 30, 1980. The showing of insolvency on these two dates, establishes a continuing insolvency during the pertinent period of respondents' operation. The speculative asser-

tion that the respondents might have been solvent using the accepted test at dates other than those used by complainant (Tr. 307) is unavailing. Such assertions were dealt with in *In re: Thumb Auction Markets*, 37 A.D. 164, 166 (1977), where it was concluded that: "In the absence of such sufficient persuasive evidence, it must be assumed that the insolvency has continued." The respondents have provided no persuasive evidence on the insolvency issue. The record shows that the Respondents have operated while insolvent. Such operation is a well-established violation of 312(a) of the Act. *In re: W.I. Bowman, supra.; In re: Hugh B. Powell*, 41 A.D. 1354, 1359-1360 (1982).

IV.

FAILURE TO PAY WHEN DUE

Respondents have stipulated that insufficient funds checks were issued during the period June 27, 1980, through August 25, 1980, as alleged, but urge that the issuance of such checks was not a violation since they were all promptly paid. The fact that such checks were later made good does not erase the violation. When an insufficient funds check is issued, it causes serious problems for those in the livestock trade who receive such a check. (*See*, e.g., testimony of Clarien Hogg at TR 362-65). As stated in *In re: Milton Bryan*, 36 A.D. 37, 42 (1977):

> The Secretary has long held that the issuance of insufficient funds checks or drafts in payment for livestock whether or not the checks or drafts are later made good constitutes an unfair and deceptive practice in violation of section 312(a) of the Act (7 U.S.C. § 213(a)). *In re Emberton*, 23 Agric. Dec. 1109 (1964); *In re Koenig*, 24 Agric. Dec. 213(1965); *In re Sklar*, 31 Agric. Dec. 872 (1972).

Section 409 of the Act (7 U.S.C. § 228b) requires a dealer or market agency purchasing livestock to pay for such livestock before the close of the next business day following purchase and transfer of possession of such livestock unless the parties expressly agree in writing before such purchase that payment may be made in a manner other than that required by the Act and regulations. It has been held that failure to pay within the time prescribed is an unfair practice in violation of section 312(a) of the Act (7 U.S.C. § 213(a)). *In re Bryan, supra* at 43, and cases cited therein.

There is no contention on the part of the respondents concerning any agreement not to pay in accord with the Act and regulations.

V.

INCREASED WEIGHTS, JUNE–AUGUST 1980

As shown in Findings 11 and 12, there were sales of cattle by respondents to Merle Hageman and to Ray Van Well. In each sale, respondents received a commission from their purchasers, and increased the weight figures on the cattle sold to Merle Hageman and Ray Van Well above the actual purchase weights of the cattle.

Testimony at the hearing demonstrates that the purchasers expected respondents to bill and collect on the basis of actual purchase weights, and that the commission was to be respondent's entire compensation for purchasing the cattle.

Weighing of the livestock is a vital part of any purchase transaction in which weight is the basis upon which the final price for the livestock is determined. False weighing "whether it is by pencil or whether it is by scale or however is considered one of the most serious violations under the Act." *In re Burrus*, 36 A.D. 1668, 1687 (1977).

The documentary evidence and testimony leave no doubt that respondents have falsely increased the weights to their principals over actual purchase weights. Increasing weights on livestock purchased on commission for a principal has consistently been found to be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and section 201.44 of the regulations (9 C.F.R. § 201.44) Issuing invoices showing such arbitrarily increased weights is a violation of section 401 of the Act (7 U.S.C. § 221). *In re Fairbanks*, 27 A.D. 1371, 1379–1382; *In re George W. Saylor, Jr.*, P&S Docket 5753, Nov. 9, 1982, 41 A.D. 2187.

VI.

FICTITIOUS WEIGHTS, JUNE–AUGUST 1980

In connection with their purchase of livestock on an agency basis, respondents issued scale tickets for livestock which had not actually been weighed and then proceeded to bill and collect from their principals on the basis of such scale tickets during the period January through June, 1980.

As stated in V above, weighing violations are among the most serious in the administration of the Act. Here the respondents sold on the basis of scale tickets prepared without actually weighing the animals. Respondents represented to their purchasers thereby that the livestock had been weighed. Such a practice is in violation of the Act and

regulations pertinent to the weighing of livestock and execution of scale tickets. It is also a violation of the Act's record-keeping requirements. *In re Jake Muehlenthaler*, 37 A.D. 313, 332–334 (1978). It is imperative that scale tickets be properly executed, reflecting not only actual weights, but the time, date and place of weighing. (9 C.F.R. §§ 201.46, 201.49, 201.55). This is all the more important where such livestock is bought on order for customers who are interested in the origin of such livestock.

VII.

INCREASED PRICES TO PRINCIPALS, JANUARY–JUNE 1980

Respondents entered into agreements with the Roegeline Company, Goehring Meat Products Corporation, and Hygrade Food Products Corporation to purchase hogs for them. The respondents were to transfer and ship such livestock to their principals at the same price they paid, and agreed to accept a commission based on weight of the animal as compensation for their buying services. However, the evidence discloses that respondents collected their commissions, and also increased the prices to their principals over what they had actually paid for the livestock. This was done by means of falsifying prices on invoices to their principals. Respondents received payment on the basis of these false invoice prices. (CX 17-35).

At the hearing, respondents sought to defend their actions by stating there was no agreement creating a principal-agent relationship, that such agreement would violate the statute of frauds, and that the purchasers never complained.

There was no question that a principal-agency relationship existed between the respondents and the three principals. The testimony of each company's representative was virtually identical with respect to terms of their agreements with the respondents. Further, the representatives testified they would not have entered into the agreements on any other terms.

In the amended answer, respondents deny the existence of an agency relationship, and further allege that any agreement between respondent and the three principals is contrary to the Statute of Frauds of the State of South Dakota and "thus unenforceable and not competent evidence."

In general, the Statute of Frauds requires certain executory contracts to be in writing. Its purpose is to prevent fraud. Noncompliance with the Statute of Frauds does not render a contract void, because the parties may disregard the statute and perform the contract; the Statute merely renders the contract unenforceable.

The Act is a remedial federal statute, enacted, in part, to assure fair competition and fair trade practices in livestock marketing. This proceeding is brought in the public interest to bring unfair trade practices to a halt. It was not instituted to enforce the terms of the agreements between respondents and the three principals. In short, the Statuce of Frauds is not applicable to disciplinary proceedings under the Act.

Respondents' amended answer asserts that since their principals never complained, the P&S Administrator lacks jurisdiction to initiate this action. The principals did not complain because they did not know the respondents were changing the prices. Each testified that had he known the respondents were changing the price, they would have complained or immediately terminated the agreement.

The record evidence leaves no doubt that respondents falsely increased prices to their principals over the amounts they actually paid for the livestock. Falsely changing prices on livestock purchased on commission for a principal has been consistently held in violation of sections 312(a) and 401 of the Act. (7 U.S.C. §§ 213(a); *In re Hatcher*, 41 A.D. 662, 665-666 (1982); *In re Collier*, 38 A.D. 957 (1979), *aff'd* 624 F.2d 190 (CA 9, 1980).

VIII.

FICTITIOUS NAMES, JUNE–JULY 1980

At issue is not whether fictitious consignor names appeared on respondents' accounts of sale at various stockyards. The respondents have stipulated that to be the case. (Tr. 68). At issue is whether the respondents violated the Act because of such usage of false names. There is conflicting testimony, Tr. 67-80, 212-219, 512-514, 524-525, as to whether respondent Hageman actually authorized someone to place false names on his livestock invoices, and the respondents cite the fact that the personnel at the stockyard would often know the true owner of livestock consigned under a false name without being specifically told. (Tr. 442-43, 514) However, Respondent Hageman knew such changes were made, and whether or not he actually changed the names himself or whether it was done by someone else is immaterial.

As stated by complainant's witness, Patrick D'Agostino at page 75 of the hearing transcript:

> Our contention, sir, is that regardless of who was the cause of the false name being put on the top of the account itself, whether it's Mr. Hageman or the trucker who hauls them in for Mr. Hageman, the true ownership, the identity of the true ownership of the livestock has been disguised or hidden.

Testimony from the packer representatives as well as from respondent Hageman himself provided ample reasons why it is advantageous for a dealer to conceal the ownership identify of the livestock. Buyers prefer animals fresh off the farm. Animals originating from a dealer may have been moved around several times in trucks to buying stations and stockyards, thus suffering shrinkage, stress and perhaps even disease. When buyers are aware livestock is dealer owned, they may not pay as much for that animal as one directly from the farm. (Tr 119-20, 155-57, 175-178, 187, 524-26) Realizing this, some dealers may use fictitious names when selling livestock to disguise their ownership, thus seeking a higher price from the unknowing buyer. This was the case here. The evidence discloses seven instances of respondents permitting their livestock to be sold under false and fictitious names.

The use of false and fictitious names by a dealer or market agency is an unfair and deceptive practice in violation of 312(a) of the Act (7 U.S.C. § 213(a)), while issuing accounts of sale showing such fictitious names is a violation of section 401 of the Act (7 U.S.C. § 221). Accord, *In re Livestock Marketing Development Co.*, 33 Agric. Dec. 784, 798, 807-08 (1974).

IX.

RESPONDENTS' VIOLATIONS OF THE ACT WERE WILLFUL

In construing regulatory statutes, a prohibited action is willful if done intentionally or with careless disregard of statutory requirements. *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 185, 187 (1973); *Goodman v. Benson*, 286 F.2d 896, 900 (CA 7, 1961); *In re: James J. Miller*, 33 A.D. 53, 83-87.

An examination of the record evidence establishes that violations of the Act and regulations committed by the respondents were done intentionally or in careless disregard of the statutory requirements.

There is no question that Respondent Hageman acted willfully in failing to increase the amount of his trust fund agreement required by the Act and regulations. He was advised twice by the Packers and Stockyards Administration within four months that he was in violation of the Act and that he should increase his trust fund agreement or post an adequate bond. He ignored the warnings and continued operating as a dealer buying and selling livestock in commerce.

Although respondent Hageman claimed he was not insolvent during the period alleged, his current liabilities exceeded his current assets during such period. Additionally, he had knowledge of his precarious financial condition when he and the two entities operating under his

control issued insufficient funds checks and failed to pay, when due, the full purchase price of livestock both before and during the period of insolvency.

Substantial evidence in the record supports the conclusion that respondents, in violation of their agency agreements, intentionally issued sales invoices to their principals showing falsely increased weights and prices. Respondents do not really dispute the facts of these transactions. Rather, the respondents state in defense that there were no agreements to pass their exact weights and purchase prices on to their purchasers. Here it must be found that where the respondents have falsely increased prices and weights and so billed and collected from their principals on the basis of such false prices and weights, that respondents have acted in willful violation of the Act and the regulations.

Record evidence is uncontradicted that respondents issued scale tickets for livestock that respondents never weighed, and then proceeded to bill and collect from their purchases on the basis of these scale tickets. The respondents were fully aware of the Act's weighing requirements. Tr. 336. And finally, evidence admitted into the record shows respondents consigned their livestock for sale under false and fictitious names. The respondents were responsible to see that the purchasers were informed as to the identity of the seller. These actions were likewise willful violations of the Act.

X.

SANCTIONS

The sanctions imposed herein are those which are proposed by complainant, and are fully supported by the record evidence.

The sanctions reflect the seriousness of the violations and are sufficient to insure future compliance with the Act by the respondents and by other dealers and market agencies operating in commerce. The record evidence establishes the seriousness of the respondents' repeated violations of the Act's provisions. Although the respondents have been cited for several separate violations of the Act, their weight and price violations alone would justify the recommended sanctions. *See, e.g., In re Hatcher*, 41 A.D. 662 (1982).

ADDITIONAL CONCLUSIONS BY JUDICIAL OFFICER

Respondents on appeal challenge the adequacy of the evidence to support Chief Judge Campbell's findings of fact. But the findings are abundantly supported by the record. Although there is a conflict in the evidence on some issues, the Chief Administrative Law Judge's findings of fact are particularly entitled to respect since they are based on his evaluation of the credibility of the witnesses.

Respondent Hageman contends that the sanctions imposed by Chief Judge Campbell are too severe. But they are not too severe in view of the many willful and serious violations committed by respondents. As to the civil penalty, it is consistent with the statutory criteria for imposing civil penalties. 7 U.S.C. § 213(b).

It is the policy of this Department to impose severe sanctions for serious violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings in recent years.

The basis for the Department's sanction policy is set forth at great length in numerous decisions, *e.g.*, *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974), set forth in the Appendix to this decision.[3] The Department's sanction policy is also discussed at length in *In re Esposito*, 38 Agric. Dec. 613, 624-65 (1979).

For the foregoing reasons, the following order should be issued.

ORDER

Respondent Hageman, his agents and employees, directly or indirectly through any corporate or other device, and respondents S&H Hogs, Inc., and S&H Feeders, Inc., their officers, directors, agents

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[3]Severe sanctions issued pursuant to this policy were sustained, *e.g.*, in *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd*, 624 F.2d 190 (9th Cir. 1980); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D. N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk* v *Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co* , 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd mem.*, 575 F.2d 879 (5th Cir. 1978); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec 26, 31-32 (1976), *aff'd* No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd mem.*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975), *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd mem.*, 510 F.2d 966 (4th Cir. 1975); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

and employees, successors and assigns, in connection with activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business while current liabilities exceed current assets;

2. Engaging in any business in any capacity for which bonding is required under the Packers and Stockyards Act and the regulations without filing and maintaining a reasonable bond or its equivalent;

3. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account(s) on which such checks are drawn to pay such checks when presented;

4. Failing to pay, when due, the full purchase price of livestock;

5. Billing and collecting from principals for livestock purchased on commission on the basis of weights other than the actual purchase weights of such livestock;

6. Issuing sales invoices or scale tickets in connection with the sale of livestock showing weights which are other than the true and correct weights of the livestock;

7. Billing and collecting from purchasers of livestock on the basis of false or incorrect weights;

8. Billing and collecting from principals for livestock purchased on commission on the basis of prices other than actual prices paid for such livestock; and

9. Consigning livestock to any stockyard for sale under false or fictitious names.

Respondents shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in their operations subject to the Act, including sales invoices, scale tickets and documents of sale which completely and accurately reflect the true nature of such transactions.

Respondent Hageman is suspended as a registrant under the Act for a period of 90 days and there after until he complies fully with the bonding requirements of the Act and regulations, and until he demonstrates that he is no longer insolvent. When Respondent Hageman demonstrates that he is in full compliance with the bonding requirements, and that he is no longer insolvent, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the 90-day period.

Respondent Hageman is assessed a civil penalty in the amount of $5,000, payable not later than the 90th day after service of this order on respondent Hageman, to be paid by certified check made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Packers and Stockyards Division, Offices of the General Counsel, Room 2446-South, United States Department of Agriculture, Washington, D.C. 20250.

The cease and desist and record keeping provisions of this order shall become effective on the day after service of this order on respondent Hageman. The suspension provisions of this order shall become effective on the 30th day after service of this order on respondent Hageman; *Provided*, however, that if by any means or device whatever, all or part of the suspension period is not effectively served during the period indicated above, the effective date of the beginning of the suspension period (or the part there of not effectively served) shall be (i) the date fixed by a court of competent jurisdiction which issues an appropriate order with respect thereto,or (ii) upon a showing made by complainant that it is not likely that such an order will be entered by any court, the date subsequently fixed by the Judicial Officer (jurisdiction is hereby retained by the Judicial Officer indefinitely for this limited purpose).

APPENDIX

Excerpt from *In re Worsley*, 33 Agric. Dec. 1547, 1556–71 (1974). [Excerpt omitted.-Ed.]

(No. 22,476)

In re: ROBERT J. SEERUP, FARMERS UNION MARKETING and PROCESSING ASSOCIATION, CONRAD A. OLSON, W.M. CAMPBELL COMMISSION CO., LEROY J. PAWLENTY and MICHAEL A. JOHNSON. P&S Docket No. 6099. Decided April 1, 1983.

Dealer—Market Agency—Consignment—Consent

Respondent Michael A. Johnson consented to the entry of this order to cease and desist from engaging in any act which causes consigned livestock to be sold at less than true market value; engaging in any practice which operates as a fraud or deceit upon any person in connection with the purchase or sale of that person's livestock; entering into any agreement with any market agency or dealer which would enable them to engage in an act which operates as a fraud or deceit upon consignors of livestock; entering into any arrangement with any market agency or dealer to share in profits derived from the resale of livestock purchased from consignments. Respondent Johnson was prohibited from engaging in business as a market agency or dealer for a period of 3 months, and was assessed a civil penalty of $10,000.

Barbara S. Harris, for complainant.

William F. Thuet, Hastings, Minnesota, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION WITH RESPECT TO MICHAEL A. JOHNSON

This proceeding was instituted under the Packers and Stockyards

Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act. This decision is entered pursuant to the consent decision provisions of the rules of practice applicable to this proceeding (7 CFR § 1.138).

Michael A. Johnson admits the jurisdictional allegations of paragraph VI of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decsion.

FINDINGS OF FACT

(1) Michael A. Johnson, hereinafter referred to as respondent Johnson, is an individual whose mailing address is 300 Johnson Parkway, Apt. 301, St. Paul, Minnesota 55106.

(2) Respondent Johnson, at all times material herein, was:

(a) Employed by respondent Campbell as a salesman to sell cattle consigned to respondent Campbell for sale on a commission basis;

(b) Engaged in the business of furnishing stockyard services; and

(c) A market agency within the meaning of that term as defined in the Act and subject to the provisions of the Act.

CONCLUSIONS

Respondent Johnson having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Michael A. Johnson, his agents and employees, directly or indirectly, through any corporate or other device, shall cease and desist from:

1. Engaging in any act, practice, or course of business for the purpose of selling consigned livestock, or causing such livestock to be sold, at less than its fair or true market value;

2. Engaging in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale, on a commission basis or otherwise, of that person's livestock;

3. Entering into, continuing in or cooperating in any arrangement agreement, understanding or course of business with any mark

agency, dealer or other purchasers of livestock, or any employee or agent of such person, which would enable such market agency, dealer or purchaser of livestock to engage in any act or practice which operates or would operate as a fraud or deceit upon the consignors of livestock; and

4. Entering into, continuing in or cooperating in any arrangement, agreement, understanding or course of business with any market agency, dealer or other purchaser of livestock, or any employee or agent of such person, to split or otherwise share in any profits derived from the resale of livestock purchased from consignments by such market agency, dealer or other purchaser.

Respondent Johnsons is prohibited for a period of three (3) months from engaging in business or operating subject to the Act as a market agency, buying or selling livestock in commerce on a commission basis or furnishing stockyard services, or as a dealer, buying or selling livestock in commerce either on his own account or as the employee or agent of the vendor or purchaser.

In accordance with section 312(b) of the Act (7 U.S.C. 213(b)), respondent Johnson is assessed a civil penalty in the amount of $10,000.

The provisions of this order shall become effective on the sixth day after service of this order on respondent Johnson.

Copies of this decision shall be served upon the parties.

(No. 22,477)

In re: PROFESSIONAL AUCTION SERVICES, INC. P&S Docket No. 6097. Decided April 5, 1983.

Dealer—Market agency—Bonding requirement—Civil penalty—Consent

Respondent consented to the entry of this decision and order in which it was ordered to cease and desist from engaging in business without filing and maintaining a reasonable bond or its equivalent. Respondent was assessed a civil penalty of $1,000.

Joanne I Schwartz, for complainant.
Richard R Saunders, Leesburg, Virginia, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging

that the respondent willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.130 et seq.).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry to this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Professional Auction Services, Inc., hereinafter referred to as the respondent, is a corporation organized and existing under the laws of the State of Virginia with its principal place of business located in Leesburg, Virginia. Its mailing address is 4-D Clubhouse Drive, P.O. Box 1399, Leesburg, Virginia 22075.

2. Respondent is and at all times material was:

(a) Engaged in the business of selling livestock in commerce on a commission basis; and

(b) Registered with the Secretary as a market agency to sell livestock on a commission basis and as a dealer to buy and sell livestock.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Professional Auction Services, Inc., its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with its activities subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

In accordance with section 312(b) of the Act (7 U.S.C. §213(b)), respondent is assessed a civil penalty in the amount of One Thousand Dollars ($1,000.00). The civil penalty shall be paid on or before April 30, 1983.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

(No. 22,478)

In re: JOHN ALLEN POTTS. P&S Docket No. 6092. Decided April 8, 1983.

Market Agency—Purchase price, failure to pay—Suspension of registration—Consent

Respondent consented to the entry of this decision and order in which he was ordered to cease and desist from failing to pay, when due, and failing to pay the full purchase price of livestock. Respondent was suspended as a registrant for 30 days and thereafter until he is no longer insolvent.

Barbara S. Harris, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the respondent does not meet the requirements of the Act, and that the respondent willfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the Complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. John Allen Potts, hereinafter referred to as the respondent, is an individual with his principal place of business located at 3330 Benner Highway, Adrian, Michigan 49221.

2. Respondent is and at all times material herein was:

(a) Engaged in business as a market agency buying livestock on a commission basis and as a dealer buying and selling livestock in commerce; and

(b) Registered with the Secretary of Agriculture as a market agency buying livestock on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, directly or through any corporate or other device, in connection with his livestock operations subject to the Packers and Stockyards Act, shall cease and esist from:

1. Failing to pay, when due, the full purchase price of livestock purchased; and

2. Failing to pay the full purchase price of livestock.

Respondent is suspended as a registrant under the Act for a period of 30 days and thereafter until such time as he demonstrates that he is no longer insolvent. When respondent demonstrates that he is no longer insolvent, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the 30 day period.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent. Copies of this decision shall be served upon the parties.

(No. 22,479)

In re: DAVID C. FOSTER and CLINTON FOSTER. P&S Docket No. 6087. Decided April 8, 1983.

Dealer—Market agency—Purchase price, failure to pay when due—Accounts and records—Consent

Respondents consented to the entry of this decision and order in which they were ordered to cease and desist from failing to pay, when due, for livestock purchased. Respondents were also ordered to keep accounts and records which fully and correctly disclose all transactions subject to the Act.

Roberta Swartzendruber, for complainant.
Respondent, *pro se.*

Decision by John G. Liebert, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR 1.138).

The respondents admit the jurisdictional allegations in paragraph 1 of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. David C. Foster and Clinton Foster, hereinafter referred to as the respondents, are partners doing business as Foster and Foster with their principal place of business at Route #1, Shawsville, Virginia 24162.

2. Respondents are and at all times material herein were:

(a) Engaged in the business of buying livestock in commerce on a commission basis and buying and selling livestock in commerce for their own account; and

(b) Registered with the Secretary of Agriculture as a market agency to buy livestock on a commission basis in commerce and as a dealer buying and selling livestock in commerce.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents, their employees and agents, directly or through any corporate or other device, in connection with their livestock operations subject to the Packers and Stockyards Act, shall cease and desist from failing to pay, when due, the full purchase price of livestock.

Respondents shall keep accounts, records and memoranda which fully and correctly disclose all transactions involved in their business subject to the Act, including; (1) a daily record of all livestock

purchases and sales; (2) copies of all buyer's bills and accounts of sale from purchases and sales of livestock at posted stockyards; (3) copies of all buyer's bills and sellers invoices for purchases and sales at other than posted stockyards; (4) a complete and current cash receipts journal and cash disbursements journal; (5) accounts receivable and accounts payable ledgers; (6) scale tickets and (7) monthly bank reconciliations.

The provisions of this Order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

(No. 22,480)

In re: LOUIE W. ARGOE and ARGOE LIVESTOCK, INC. P&S Docket No. 6101. Decided April 18, 1983.

Dealer—Insolvency—Checks or drafts—Purchase price—Suspension of registration—Civil penalty—Consent

Respondents consented to the entry of this decision and order in which they were ordered to cease and desist from engaging in business while insolvent, issuing insufficient funds checks, failing to honor drafts drawn in payment for livestock when presented for payment, failing to pay and failing to pay when due the full purchase price of livestock. Corporate respondent was suspended as a registrant for 90 days and thereafter until solvency is demonstrated. Individual respondent was assessed a civil penalty of $2,500.

Barbara S Harris, for complainant.
William E. S. Robinson, Columbia, South Carolina, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. 181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the corporate respondent's financial condition does not meet the requirements of the Act and that the respondents willfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the Complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Argoe Livestock, Inc., hereinafter referred to as the corp respondent, is a corporation with its principal place of busine cated at Orangeburg, South Carolina. Its business mailing ad is P.O. Box 721, Orangeburg, South Carolina 29115.

2. Corporate respondent, at all times material herein, was:

(a) Engaged in the business of buying and selling livesto commerce for its own account; and

(b) Registered with the Secretary of Agriculture as a deal buy and sell livestock in commerce.

3. Louie W. Argoe, herein refered to as the individual res dent, is an individual whose business mailing address is P.O. 721, Orangeburg, South Carolina 29115.

4. The individual respondent is, and at all times material he was, the president of the corporate respondent, and managed rected and controlled the livestock business operations of the co rate respondent.

5. The individual respondent, at all times material therein, w dealer within the meaning of that term as defined in the Act, subject to the provisions of the Act and regulations.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and parties having agreed to the entry of this decision, such decis will be entered.

ORDER

Respondent Argoe Livestock, Inc., its officers, directors, ager and employees, and respondent Louie W. Argoe, individually or as officer, agent or employee of respondent Argoe Livestock, Inc., rectly or through any corporate or other device, in connection with spondents' activities subject to the Packers and Stockyard Act, sh cease and desist from:

1. Engaging in business as a market agency or dealer while ins vent, i.e., while their current liabilities exceed their current asset

2. Issuing checks in payment for livestock purchases witho having and maintaining sufficient funds on deposit in the bank a count upon which such checks are drawn to pay such checks wh presented for payment;

3. Failing to honor drafts drawn in payment for livestock pu chases by respondents when such drafts are presented for paymen

4. Failing to pay, when due, the full purchase price of livestoc and

5. Failing to pay the full purchase price of livestock.

The corporate respondent is suspended as a registrant under the Act for a period of ninety (90) days and thereafter until it demonstrates that it is no longer insolvent. When the corporate respondent demonstrates that it is no longer insolvent, a supplemental order will be issued in this proceeding terminating this suspension after the ninety (90) day period.

Respondent Louie W. Argoe is assessed a civil penalty in the amount of two thousand five hundred dollars. ($2,500).

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondents.

Copies of this decision shall be served upon the parties.

(No. 22,481)

In re: CENTRAL COAST MEATS, INC., HAROLD HABIB and HARRY S. HABIB. P&S Docket No. 6020. Decided April 19, 1988.

Packer—Final payment, based on other than actual weights or prices—Recording inaccurate weights—Inaccurate weighing—Paying consignors based on inaccurate weights and prices—Failing to disclose details of purchase agreement—Failing to remit, when due, net proceeds—Failing to pay when due—Destroying records—Civil penalty—Consent

Respondents consented to the entry of this decision and order in which they were ordered to cease and desist from making final payment based on other than actual weights and prices; recording incorrect weights on documents; weighing livestock or livestock carcasses at other than true and correct weights; accounting to and paying consignors based on incorrect weights or prices; failing to make final payment based on actual hot carcass weights; failing to disclose prior to purchase complete details of the purchase agreement which affect the final weight and price upon which payment will be made; failing to remit net proceeds when due; failing to pay when due; destroying accounts and records which show actual hot weights of livestock or destroying any other records necessary to show full and correct nature of transactions involved in respondents' business as a packer. Respondents were ordered to keep and maintain accounts and records which correctly disclose the true nature of all transactions involved in their business subject to the Act. Respondent Central Coast Meats was assessed a civil penalty of $15,000 and respondents Harold Habib and Harry Habib were assessed civil penaltys of $7,500 each.

Jory Hochberg, for complainant.
Todd C. Gaskill, Fresno, California for respondent.

Decision by William J. Weber, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. 181 et seq.) by a Complaint and Notice of Hearing filed

by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 C.F.R 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Central Coast Meats, Inc., doing business as Hanford Meat Packing Company, hereinafter referred to as respondent Central Coast, is a corporation whose business mailing address is P.O. Box 632, Hanford, California 93230.

2. Respondent Central Coast is and at all times material herein was:

(a) Engaged in the business of purchasing livestock in commerce for purposes of slaughter and manufacturing and preparing meats for sale and shipment in commerce; and

(b) A packer within the meaning and subject to the provisions of the Act.

3. Harold Habib, hereinafter referred to as respondent Harold Habib, is an individual whose business mailing address is P.O. Box 632, Hanford, California 93230.

4. Respondent Harold Habib is and at all times material herein was:

(a) President of respondent Central Coast; and

(b) The owner of 26 percent of the outstanding stock issued by respondent Central Coast.

5. Harry S. Habib, hereinafter referred to as respondent Harry Habib, is an individual whose business mailing address is P.O. Box 632, Hanford, California 93230.

6. Respondent Harry Habib is and at all times material herein was:

(a) Vice President of respondent Central Coast; and

(b) The owner of 26 percent of the outstanding stock issued by respondent Central Coast.

7. Respondents Harold Habib and Harry Habib are and at all times material herein were:

(a) Responsible for the direction, management and control of respondent Central Coast;

(b) Engaged in the business of buying livestock in commerce for purposes of slaughter and manufacturing and preparing meats for sale and shipment in commerce; and

(c) A packer within the meaning and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Central Coast, its officers, directors, agents and employees, directly or through any corporate or other device, and respondents Harold Habib and Harry Habib, their agents and employees, directly or through any corporate or other device, shall cease and desist from:

(1) Making final payment for livestock slaughtered and sold on consignment on the basis of weights or prices other than the actual weights or prices at which the slaughtered carcasses, or parts thereof, are sold;

(2) Recording or causing to be recorded inaccurate or incorrect hot or cold weights on kill sheets, shipping documents, accountings and invoices, or any other document or record which purports to show the hot or cold weights of livestock carcasses or parts thereof;

(3) Weighing livestock, livestock carcasses or parts thereof, or causing them to be weighed, at other than the true and correct weights;

(4) Accounting to and paying the sellers or consignors of livestock on the basis of inaccurate or incorrect weights or prices;

(5) Failing to settle and make final payment for livestock purchased on a carcass weight basis on the actual hot carcass weights of such livestock.

(6) Failing to disclose to sellers or consignors of livestock, prior to the purchase or acquisition of such livestock, complete and accurate details of the purchase contract or agreement which affect the final weight and price upon which the seller or consignors will be paid;

(7) Failing to remit, when due, the net proceeds of livestock slaughtered and sold on consignment;

(8) Failing to pay, when due, the full purchase price of livestock;

(9) Destroying accounts, records and memoranda which show the actual hot weights of livestock slaughtered by respondents, or destroying any other record necessary to show the full and correct nature of any transaction involved in respondents' business as a packer, other than in compliance with the policy set forth in section 203.4 of the policy statements issued under the Act (9 C.F.R. 203.4).

Respondents Central Coast, Harold Habib and Harry Habib shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in their business subject to the Packers and Stockyards Act, including, but not limited to: (1) sales invoices; (2) transfer records; (3) kill sheets showing the actual hot weights of slaughtered livestock; (4) purchase invoices; and (5) all other accounts and records which show the actual number, weight and price at which livestock are purchased and carcasses or parts thereof are sold.

Pursuant to section 203(b) of the Act (7 U.S.C. 193(b)) respondent Central Coast is assessed a civil penalty in the amount of $15,000.00; respondent Harold Habib is assessed a civil penalty in the amount of $7,500.00; and respondent Harry Habib is assessed a civil penalty in the amount of $7,500.00. These civil penalties shall be payable by certified checks or by money orders made to the order of the Treasurer of the United States.

Respondent Central Coast shall deliver a copy of this Decision and Order to all of its personnel whose duties or responsibilities include, in whole or in part, the accounting to and payment of the sellers and consignors of livestock.

The provisions of this Order shall become effective on the first day after service of this Order on the respondents.

Copies of this decision shall be served upon the parties.

(No. 22,482)

In re: UNION PACKING COMPANY OF OMAHA. P&S Docket No. 6053. Decided April 19, 1983.

Packer—Final Payment, based on other than hot carcass weight—Recording inaccurate weights—Inaccurate weighing— Altering weights—Invoicing and collecting based on altered or inaccurately recorded weights—Maintaining and operating livestock and monorail scales—Accounts and records—Civil penalty—Consent

Respondent consented to the entry of this decision and order in which it was ordered not to: fail to make payment based on actual hot carcass weights; record incorrect

weights on documents; weigh livestock and carcasses at other than true and correct weights; alter cold weights of carcasses as recorded on documents, invoice and collect based on altered or inaccurately recorded weights Respondent was also ordered to maintain and operate all livestock or monorail scales in a manner which will ensure accurate weights and agreed to maintain accounts and records which fully and correctly disclose the true nature of all transactions subject to the Act. Respondent was assessed a civil penalty of $20,000.

Peter V. Train, for complainant.
Dennis J Fogland, Omaha, Nebraska, for respondent.

Decision by John A. Campbell, for Victor W. Palmer, Administrative Law Judges.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging violations of the Act and the regulations issued thereunder (9 C.F.R. § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the Complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Union Packing Company of Omaha, hereinafter referred to as the respondent, is a Nebraska corporation with its principal place of business located at Omaha, Nebraska. Its business mailing address is 4501 So. 36th Street, Omaha, Nebraska 68107.

2. The respondent is, and at all times material herein was, engaged in the business of buying livestock in commerce for purposes of slaughter.

3. The respondent is, and at all times material herein was, a packer within the meaning of that term as defined in the Act, and subject to the provisions of the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Union Packing company of Omaha, its officers, directors, agents and employees, directly or indirectly through any corporate or other device, shall not:

1. Fail to account and make final payment for livestock purchased on a carcass weight basis on the actual hot carcass weight of such livestock;

2. Record inaccurate or incorrect hot or cold weights on carcass tags, hot scale sheets, kill sheets, cold weight manifests, shipping documents, accountings and invoices, or any other document or record which purports to show the hot or cold weights of livestock carcasses or parts thereof;

3. Weigh livestock, livestock carcasses or parts thereof, at other than the true and correct weights;

4. Alter the cold weights of carcasses as recorded on cold weight manifests, shipping documents, accounting and invoices, or any other document used in the sale of beef; and

5. Invoice and collect from purchasers of livestock carcasses or parts thereof on the basis of cold weights which have been altered or recorded inaccurately.

It is further ordered that respondent Union Packing Company of Omaha, its officers, directors, agents and employees, shall:

1. Maintain and operate all livestock or monorail scales owned or controlled by it in such a manner as to ensure accurate and correct weights;

2. Prior to the start of each day's operations, and as often as necessary during each day's operations to ensure the scale remains in balance, balance all monorail scales owned or controlled by it, verify such zero-load balance, and record the zero-load balance on a permanent document, showing the date and time when the balance was checked and zero-load balance verified, with the name or initials of the person performing the balance check;

3. Prior to the start of each day's operations, conduct a test of all monorail scales owned or controlled by it to ensure that the scale is operating properly, and conduct a proper test, at least weekly, as such test is defined and specified in section 201.78-1 of P&S regulations (9 C.F.R. § 201.78-1);

4. Use a tare when weighing livestock carcasses which does not exceed the actual weight of the hooks, rollers, gambrels or other equipment being used during such weighing; and

5. Prior to the start of each day's operations, and as often as necessary during each day's operations, properly adjust the tare on any monorail scale owned or controlled by respondent to ensure the tare is proper.

Respondent Union Packing Company of Omaha agrees to keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in its operations subject to the Packers and Stockyards Act, including original hot scale printouts, hot scale sheets, hot carcass weight tags or comparable records showing individual carass weight and identity of livestock purchased on a carcass weight basis, cold weight manifests, accounts of sale and purchase invoices showing the true and accurate hot and cold weights of livestock purchased on a carcass weight basis.

Respondent Union Packing company of Omaha is assessed a civil penalty in the amount of $20,000.00, which shall be payable by certified check or money order to the Treasurer of the United States.

Respondent Union Packing Company of Omaha shall deliver a copy of this Decision and Order to all of its personnel whose duties or responsibilities include, in whole or in part, the operation of its livestock and monorail scales, the weighing of livestock or livestock carcasses (hot and cold weighing), the accounting to and payment of the sellers of livestock, and the billing and invoicing to purchasers of livestock carcasses or parts thereof.

The provisions of this order shall become effective on the first day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

(No. 22,483)

In re: SUFFOLK PACKING CO., INC. and GERALD JAFFE. P&S Docket No. 6090. Decided April 25, 1983.

Packer—Tare greater than actual—Accounts of purchase, fail to show correct weights—Payment, based on incorrect weights—Scales, failing to operate to ensure accurate weights—Weighing to nearest graduation—civil penalty—Consent

Respondents consented to the entry of this decision and order in which they were ordered to cease and desist from: using a tare when weighing greater than equipment being used; using hooks, rollers and gambrels not of uniform weight; issuing accounts of purchase which fail to show correct weights; making payment based on incorrect weights; failing to operate scales in a manner as to ensure accurate weights; and failing to weigh livestock to the nearest minimum graduation. Respondents were also ordered to issue accountings to sellers which include actual weights and prices. Respondents were assessed a civil penalty of $10,000.

Peter V. Train, for complainant.

Arthur R. Curtis, Chicago, Illinois, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packer and Stockyards Act (7 U.S.C. 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR 1.138).

The respondents admit the jurisdictional allegations in paragraphs I and II of the Complaint and Notice of Hearing and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this order.

FINDINGS OF FACT

1. Suffolk Packing Co., Inc., hereinafter referred to as the corporate respondent, is a corporation whose mailing address is P.O. Box 1012, 725 N. Main Street, Suffolk, Virginia 23434.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter; and

(b) A packer within the meaning of and subject to the provisions of the Act.

3. Gerald Jaffe, hereinafter referred to as the individual respondent, is an individual whose business address is P.O. Box 1012, 725 N. Main Street, Suffolk, Virginia 23434.

4. The individual respondent is, and at all times material herein was:

(a) President of the corporate respondent;

(b) Majority stockholder of the corporate respondent; and

(c) Responsible for the direction, management and control of the corporate respondent.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to this decision, such decision will be entered.

ORDER

The corporate respondent, its officers, directors, agents, employees, successors and assigns, and the individual respondent, individually or as an officer, director, agent or employee of the corporate respondent or its successors, directly or through any corporate or other device, in connection with their operations as a packer subject to the Packers and Stockyards Act, shall cease and desist from:

1. Using a tare when weighing livestock carcasses greater than the actual weight of the hooks, rollers, gambrels or other equipment being used during such weighing;

2. Using hooks, rollers, gambrels or other equipment during weighing which are not uniform in weight;

3. Issuing, or causing to be issued, accounts of purchase to persons who have sold livestock to respondents on a carcass weight, or carcass grade and weight, or carcass value basis which fail to show the accurate and correct weights of the livestock purchased;

4. Paying sellers on the basis of inaccurate and incorrect weights;

5. Failing to settle and make payment for livestock purchased on a carcass weight, or carcass grade and weight, or carcass value basis on actual hot carcass weights;

6. Failing to maintain and operate any livestock or monorail scal owned or controlled by respondent in such a manner as to ensure ac curate and correct weights; and

7. Failing to weigh livestock purchased on a carcass weight, c carcass grade and weight, or carcass value basis to the nearest minimum graduation on the scale used on the kill floor.

Respondents, when purchasing livestock on a live weight basis, shall issue accountings to the sellers of livestock which shall include the actual live weight of the livestock.

Respondents, when purchasing livestock on a carcass weight, carcass grade and weight, or carcass value basis, shall issue accountings to the sellers of livestock which shall include the actual hot carcass weight of the livestock and the actual price per pound paid for the carcass.

For the purpose of this order, livestock will be considered to be purchased on a carcass weight, or carcass grade and weight, or carcass value basis whenever price is determined after slaughter.

In accordance with section 203(b) of the Act (7 U.S.C. 193(b)), respondents Suffolk Packing Co., Inc., and Gerald Jaffe are jointly and severally assessed a civil penalty in the amount of ten thousand dollars ($10,000.00).

This order shall have the same force and effect as if entered after the full hearing and shall be effective on the first day after service upon respondents.

(No. 22,484)

In re: JAMES H. WOOD d/b/a WOODLAND AUCTION YARD. P&S Docket No. 6074. Decided April 26, 1983.

Dealer—Market agency-Scales, periodic testing and inspection—Civil penalty—Consent

Respondent consented to the entry of this decision and order in which he was ordered to cease and desist from: failing to have scales used to weigh livestock tested semi-annually; and using any scale to weigh livestock unless it has been found by semi-annual tests and inspections to be in a condition to give accurate weights. Respondent was assessed a civil peanalty of $250.

Roberta Swartzendruber, for complainant.
Respondent, *pro se*.

Decision by John G. Liebert, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. James H. Wood, hereinafter referred to as the respondent, is an individual who at all times material herein was doing business as Woodland Auction Yard. His principal place of business is located in Woodland, Washington, and his mailing address is P.O. Box 430, Woodland, Washington 98674.

2. Respondent, at all times material herein, was:

(a) Engaged in the business of conducting and operating the

Woodland Auction Yard stockyard, a posted stockyard under the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of buying and selling livestock on a commission basis at the stockyard, and buying and selling livestock in commerce for his own account; and

(c) Registered with the Secretary of Agriculture as a market agency and dealer to buy and sell livestock in commerce.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Wood, his agents and employees directly or indirectly through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to have any livestock scale under his control and used to weigh livestock tested by a competent agency on a semi-annual basis; and

2. Operating or using any livestock scale used to weigh livestock unless it has been found, by semi-annual tests and inspections, to be in a condition to give accurate weights.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of two hundred and fifty dollars ($250.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

(No. 22,485)

In re: INTERNATIONAL CATTLE COMPANY, SOUTHERN LIVESTOCK, INC., MIKE TOMKOW, JR., CECIL M. YATES, SR., D. L. CRUM, C. W. BAILEY, and ERNIE L. KENNEDY. P&S Docket No. 6076. Decided April 26, 1983.

Dealer—Insolvency—Insufficient funds checks—Failing to pay when due—Consent

Respondent Cecil M. Yates, Sr. consented to the entry of this decision and order in which he was ordered to cease and desist from engaging in business while insolvent, issuing insufficient funds checks, failing to pay and failing to pay when due the full purchase price of livestock.

Barbara S Harris, for complainant
Joseph E. Neduchal, Orlando, Florida, for respondent

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION WITH RESPECT TO CECIL M. YATES, SR.

This proceeding was instituted under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent International Cattle Co.'s financial condition does not meet the requirements of the Act and that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.138).

Respondent Cecil M. Yates, Sr. admits the jurisdictional allegations in paragraphs I(e), I(g) and I(i) of the complaint, neither admits nor denies the allegations in paragraph I(1) of the complaint, and specifically admits that at all times material to the complaint, he purchased livestock as an agent of respondent ICC and was, therefore, a dealer within the meaning of the Act. Respondent Yates waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Cecil M. Yates, hereinafter referred to as respondent Yates, is an individual whose address is 906 Palmetto Avenue, Kissimmee, Florida 32741.

2. Respondent Yates was, during its operational life, vice president of respondent Southern and, in combination with respondents Tomkow and Crum, owns 100 percent of the stock of respondent Southern.

3. Respondent Yates, at all times material herein, directed, managed and controlled the business activities of respondent Southern in combination with respondents Tomkow and Crum.

4. Respondent ICC, at all times material herein, was engaged in the business of buying and selling livestock in commerce and was registered with the Secretary of Agriculture as a dealer.

5. Respondent Yates, at all times material herein, purchased livestock as the agent of respondent ICC, and, therefore, was a dealer within the meaning of the Act.

CONCLUSIONS

Respondent Cecil M. Yates, Sr. having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Cecil M. Yates, Sr., his agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Engaging in business as a dealer or market agency while insolvent, *i.e.*, while his current liabilities exceed his current assets;
2. Issuing checks or drafts in payment for livestock purchases without having and maintaining sufficient funds available in the bank account upon which such checks or drafts are to be drawn to pay such checks or drafts when presented;
3. Failing to pay, when due, the full purchase price of livestock; and
4. Failing to pay the full purchase price of livestock.

The provisions of this order shall become effective on the sixth day after service of this order on respondent.

Copies of this decision shall be served upon the parties.

(No. 22,486)

In re: FAULKTON LIVESTOCK EXCHANGE, INC., and GRANT HENKELVIG. P&S Docket No. 6105. Decided April 28, 1983.

Dealer—Market agency—Insolvency—Custodial account—Insufficient funds checks—Remitting net proceeds—Failing to pay when due—Bonding requirement—Suspension—Consent

Respondents consented to the entry of this decision and order in which they were ordered to cease and desist from engaging in business while insolvent, failing to properly maintain their custodial account for shippers proceeds, issuing insufficient funds checks in payment for livestock, failing to remit to consignors the net proceeds from the sale livestock, failing to pay when due, and engaging in business without having and maintaining a reasonable bond. The corporate respondent was suspended for 60 days and thereafter until solvent, the deficit in its custodial account has been eliminated, and is in compliance with the bonding requirements. The individual respondent was ordered not to engage in business for 60 days and thereafter until he is in compliance with the bonding requirements.

Roberta Swartzendruber, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. 181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the corporate respondent's financial condition does not meet the requirements of the Act and that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the Complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Faulkton Livestock Exchange, Inc., hereinafter referred to as the corporate respondent, is a corporation with its principal place of business located at Faulkton, South Dakota.

2. The corporate respondent at all times material herein was:

(a) Engaged in the business of conducting and operating the Faulkton Livestock Exchange, Inc. stockyard, a posted stockyard under the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard and buying and selling livestock in commerce for its own account; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

(3) Grant Henkelvig, hereinafter referred to as the individual respondent, in combination with his wife, owned 100 percent of the outstanding stock of said corporate respondent and was president of the corporate respondent.

(4) The individual respondent directed, managed and controlled all business activities of the corporate respondent.

(5) The individual respondent was engaged in the business of a dealer and market agency buying and selling livestock in commerce.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the

parties having agreed to the entry of this decision, such decision will be entered.

ORDER

The corporate respondent, its officers, directors, agents, employees, successors and assigns, and the individual respondent, directly or through any corporate or other device, shall cease and desist from:

(1) Engaging in business as a market agency or dealer while insolvent, i.e. while current liabilities exceed current assets;

(2) Failing to maintain their "Custodial Account for Shippers' Proceeds" in conformity with the provisions of section 201.42 of the regulations (9 CFR 201.42);

(3) Failing to deposit in their "Custodial Account for Shippers' Proceeds" within the time prescribed by Section 201.42 of the regulations, an amount equal to the proceeds receivable from sales of consigned livestock;

(4) Issuing checks to owners or consignors of livestock in payment of the net proceeds due from the sale of their livestock without having sufficient funds available in the account upon which they are drawn to pay such checks when presented;

(5) Failing to remit to the owners or consignors of livestock, when due, the net proceeds derived from the sale of their livestock;

(6) Issuing checks in payment for livestock without having sufficient funds on deposit and available to pay such checks when presented for payment;

(7) Failing to pay, when due, for livestock; and

(8) Engaging in business in any capacity for which bonding is required under the Act and the regulations without having and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

The corporate respondent is suspended as a registrant under the Act for a period of 60 days and thereafter until it demonstrates that it is no longer insolvent, that the deficit in its "Custodial Account for Shippers' Proceeds" has been eliminated and that it is in full compliance with the bonding requirements of the Act. When corporate respondent demonstrates it is no longer insolvent, that the deficit in its "Custodial Account for Shippers' Proceeds" has been eliminated and it is in full compliance with the bonding requirements of the Act, a Supplemental Order will be issued in this proceeding terminating this suspension after the expiration of the 60 day period of suspension.

The individual respondent shall not engage in business as a dealer

or market agency for a period of 60 days and thereafter until he demonstrates that he is in full compliance with the bonding requirements of the Act.

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondents.

Copies of this decision shall be served upon the parties.

MAGIC VALLEY POTATO SHIPPERS, INC. *v.* THE SECRETARY OF AGRICULTURE. Civil Action No. 81–7863. (USDA PACA Docket No. 2–5671) Decided April 1, 1983.

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Before Circuit Judges GOODWIN, ALARCON, and FERGUSON.

PETITION FOR REVIEW OF AN ORDER OF THE SECRETARY OF AGRICULTURE

Magic Valley Potato Shippers, Inc., a packer and shipper of fresh Idaho potatoes, appeals the decision of the Secretary of Agriculture that it misbranded and shipped nine lots of potatoes in violation of 7 U.S.C. § 499b(5). It appeals as well the suspension of the company's Perishable Agricultural Commodities Act license for thirty days. Because the applicable regulations are clear and Magic Valley had fair notice of them, we affirm.

An administrative complaint was filed against Magic Valley by the United States Department of Agriculture (USDA) after the company defiantly shipped to three out-of-state receivers nine lots of potatoes labeled as U.S. No. 1 grade despite the fact that the potatoes failed inspection at that grade due primarily to an internal defect known as net necrosis. An administrative law judge found that Magic Valley had violated the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. § 499b(5), by such shipment and suspended its PACA license for sixty days. On appeal, the Secretary of Agriculture affirmed the findings of violation but reduced the suspension to thirty days.

On review, Magic Valley contends that this decision should be set aside because the USDA potato grading standards as applied to net necrosis are internally inconsistent and therefore void for vagueness. In addition, Magic Valley argues that the thirty-day license suspension is unduly harsh in the light of the circumstances.

I.

In considering whether or not an administrative regulation is unconstitutionally vague, the reviewing court must assess it within the context of the particular conduct to which it is being applied. *United States v. National Dairy Corp.*, 372 U.S. 29, 36 (1963); *Donovan v. Royal Logging Co.*, 645 F.2d 822, 831 (9th Cir. 1981); *United States v. Dacus*, 634 F.2d 441, 444 (9th Cir. 1980). The regulation must "give a person of ordinary intelligence fair notice" of

what is required. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *Donovan v. Royal Logging Co.*, 645 F.2d at 831. For Magic Valley to be found guilty of misrepresenting the grade of its potatoes in violation of 7 U.S.C. § 499b(5), it is necessary that the applicable regulations give it fair notice of what is required for a shipment of potatotes to be certifiable as U.S. No. 1 grade.

The "United States Standards for Grades of Potatoes" set forth at 7 C.F.R. §§ 2851.1540–.1566,[1] as applied to net necrosis, are clear and definite. Net necrosis is an internal defect which produces discoloration both inside and outside of a potato's vascular ring. The standards specify that internal defects producing discoloration outside of or not entirely confined within the vascular ring are to be measured by how much of the potato has to be pared away to remove the defect. 7 C.F.R. § 2851.1565. If removal of the defect produces a loss of five percent or more of the weight of an individual potato, the potato is considered damaged. *Id.* If the weight of all such damaged potatoes exceeds five percent of the total weight of the lot, and the weight of all defective potatoes combined exceeds eight percent of the total weight, the lot is not certifiable as U.S. No. 1. 7 C.F.R. § 2851.1546(2) & (2) (ii).

Before the potatoes left the plant, Magic Valley had fair notice that the lots were not certifiable as U.S. No. 1. The instructional manuals for market inspections define net necrosis in detail and note that since it is not limited to the area within the vascular ring, it is to be scored on the pare-away basis. The inspectors explained this to the company's president and, by cutting potatoes at the plant, demonstrated to him that the potatoes were seriously damaged. Despite this, Magic Valley shipped the potatoes as U.S. No. 1, still contending that the inspectors had used the wrong method of inspection.

The regulations for grading potatoes are clear and were properly applied with respect to net necrosis. Magic Valley had fair notice of potential violation. We affirm the Secretary's determination of violation and reject the petitioner's contention that the regulations are void for vagueness.

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[1] The potato standards have been renumbered as 7 C.F.R. §§ 51.1540–.1566. However, at the time this case was considered by the Secretary of Agriculture the old numbers, i.e., 7 C.F.R. §§ 2851.1540–.1566, still applied. For ease of reference, the former numbering is used herein. The regulations under the current numbering system are themselves unchanged.

II.

The Secretary's choice of sanction is not to be overturned unless the reviewing court determines it is " 'unwarranted in law ... or without justification in fact . . . .' " *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 185–86 (1973), *quoting American Power Co. v. SEC*, 329 U.S. 90, 112–13 (1946); *Hinkle Northwest, Inc. v. SEC*, 641 F.2d 1304, 1310 (9th Cir. 1981); *see also* 5 U.S.C. § 706(2)(A). The fashioning of an appropriate remedy is for the Secretary of Agriculture and not for the court. *Butz*, 411 U.S. at 188–89. "The court may decide only whether, under the pertinent statute and relevant facts, the Secretary made 'an allowable judgment in [his] choice of the remedy.' " *Id.* at 189, *quoting Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612 (1946).

The thirty-day suspension of Magic Valley's license is well within the ninety-day maximum permitted by the applicable statute, 7 U.S.C. § 499h(a), and is therefore clearly not "unwarranted in law." The suspension is also justified in fact since Magic Valley, in open defiance of the USDA inspectors, knowingly misbranded and shipped nine lots of potatoes as U.S. No. 1 when they were clearly not so certifiable. The company also refused to recall these shipments or give information as to their destination.

The Secretary made an allowable judgment in his choice of remedy under the pertinent statute and the relevant facts. *Butz*, 411 U.S. at 189. He concluded that a thirty-day suspension during the active season would serve as an adequate deterrent to Magic Valley as well as to other potential violators. In reducing the penalty to thirty days, he took into consideration the fact that this was the company's first offense. This order is clearly within the broad discretion given him by Congress to impose sanctions to deter repeated violations of the Act. *Id.* at 187–88; *accord Maine Potato Growers v. Butz*, 540 F.2d 518, 520, 523 (1st Cir. 1976) (upholding sixty-day suspension of potato growers cooperative's license for shipping misbranded potatoes).

The decision and final order of the Secretary are affirmed, and the case is remanded to set the date of the thirty-day suspension of Magic Valley's PACA license to take effect during the active season for packing and shipping Idaho potatoes.

DISCIPLINARY DECISIONS

(No. 22,487)

In re. YANKEE BROKERAGE, INC. PACA Docket No. 2-6130. Decided December 30, 1982.

Failure to make full payment promptly—Publication of the facts—Default

Respondent's failure to pay 61 sellers for the purchase of 363 lots of fruit and vegetables constitutes willful, repeated and flagrant violations of the Act. The facts and circumstances set forth shall be published.

Andrew Y.Stanton, for complainant.
William E Shull, Kansas City, Missouri, for respondent.

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on October 8, 1982, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period May 1981 through November 1981, respondent purchased and accepted, in interstate and foreign commerce, from 61 sellers, 363 lots of fruit and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $975,833.21.

A copy of the complaint was served upon respondent on October 21, 1982, which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, Yankee Brokerage, Inc., is a corporation, whose address is P.O. Box 12458, North Kansas City, Missouri 64116.

2. Pursuant to the licensing provisions of the Act, license number 680253 was issued to respondent on August 10, 1967. This license was renewed annually, but terminated on August 10, 1982, when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period May 1981 though November 1981, respondent purchased and accepted in interstate and foreign commerce from 61 sellers, 363 lots of fruit and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed prices, in the total amount of $975,833.21.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 363 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final February 9, 1983.—Ed.]

(No. 22,488)

In re: ROBERSON PRODUCE CO., INC. PACA Docket No. 2-6121. Decided March 1, 1983.

Failure to pay promptly—Revocation of license

Respondent failed to pay promptly for perishable agricultural commodities purchased in commerce which constitutes willful, flagrant and repeated violations of the Act for which respondent's license was revoked.

Dennis Becker, for complainant.

J. Michael Lamberth, Atlanta, Georgia, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

By reason of pleadings filed in this proceeding, the Complainant herein has moved for a decision on the pleadings. That Motion, filed January 4, 1983, is hereby granted for the following reasons.

The Complaint filed in this proceeding alleges in paragraph 5 thereof that the Respondent violated section 2(4) of the Perishable Agricultural Commodities Act, (7 U.S.C. § 499b(4)), hereinafter sometimes referred to as "PACA," by "failing to make full payment promptly to 82 sellers of the agreed purchase prices, or balances thereof, in the total amount of $719,735.25 for 313 lots of perishable agricultural commodities purchased and accepted in interstate and foreign commerce" during the period September 1981 through February 1982. It was further alleged in paragraph 7 that such violations were willful, flagrant and repeated violations of the PACA. By "Memorandum of Points and Authorities In Support of Motion for Decision on the Pleadings", filed January 4, 1983, the Complainant has altered its allegations in the following respects, premised upon documents filed with the Bankruptcy Court, and, in particular, "Schedule A—Statement of all Liabilites of Debtor", of which official notice is taken. Said Schedule A shows discrepancies between the amounts shown in the Complaint and those shown on Schedule A, with respect to 58 transactions in the total amount of $95,229.80. For the purposes of Complainant's Motion it has abandoned allegations of wrong-doing with respect to the following transactions set forth in paragraph 5 because "there may be material issues of fact to be resolved."

Transaction Numbers	Amount
20–24	$ 386.00
25–28	7,596.30
78–81	4,113.50
111–147	52,306.00
148–151	19,800.50
180	37.50
268	1,610.00
281–282	9,380.00
	$95,229.80

When the above-mentioned transactions and amounts are deducted from those alleged in the Complaint, Respondent has still been shown to have violated section 2 of the Act 255 times in a total amount of $624,505.47 by failing to pay 74 sellers for perishable

agricultural commodities purchased and accepted in interstate commerce.

Complainant requests that Respondent's license be revoked as provided in section 8 of the PACA (7 U.S.C. 499h). On October 28, 1982, Respondent filed its Answer in which it asserted in paragraph V that any debts it owes to produce creditors are reflected in papers filed pursuant to Chapter 11 in the Bankruptcy Court for the Northern District of Georgia, Atlanta Division, but otherwise denied the allegations contained in paragraph 5 of the Complaint. Respondent further denied in paragraph VII of its Answer the allegations contained in paragraph 7 of the Complaint that the violations were willful, flagrant and repeated. In addition, the Respondent raised certain affirmative defenses such as:

1. The Complaint fails to state a cause of action on which relief may be granted;

2. Since Respondent is in a Chapter 11 Bankruptcy proceeding, this administrative proceeding is premature, and frustrates the fresh start provisions and the automatic stay provisions provided for in 11 U.S.C. 362, and 7 U.S.C. 499d(2); and,

3. This proceeding contravenes the policies of section 525 of the Bankruptcy Act, and discriminates against the Respondent.

The Respondent's contentions have been carefully considered. Premised upon the admissions of fact by the Respondent, and, the application of the legal precedent set forth by the Department of Agriculture in its published decisions, and the absence of any Federal Court decision to the contrary, the Respondent's contentions must fail.

The pleadings clearly sustain the following Findings of Fact.

FINDINGS OF FACT

1. The address of Respondent Roberson Produce Co., Inc., hereinafter sometimes referred to as "Respondent", is State Farmers Market, Units 19–26, Forest Park, Georgia 30050.

2. Exhibit "A" to the Complainant's Motion for a Decision contains a "Termination Notice", dated October 27, 1982, addressed to the Respondent wherein it is stated, among other things,

> "Your license under the Perishable Agricultural Commodities Act terminated on the above date (circled in red) as the annual fee was not paid."

3. Pursuant to the licensing provisions of the PACA, license number 700397 was issued to Respondent on September 10, 1969.

4. Section 2 of the PACA (7 U.S.C. 499b(4) provides as follows:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction.

5. During the period September 1981 through February 1982, Respondent violated Section 2 of the PACA (7 U.S.C. 499b(4)) by failing to make full payment promptly to 74 sellers in 255 transactions of the agreed purchase prices, or balances thereof, in the total amount of $624,505.47, for lots of perishable agricultural commodities purchased and accepted in interstate and foreign commerce. The details of these transactions are set forth in paragraph 5 of the Complaint, as amended by the Complainant's aforesaid Motion for Decision on the pleadings, filed January 4, 1983.

6. On January 20, 1982, Respondent filed a Petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. 1101, *et seq.*), in the U.S. Bankruptcy Court for the Northern District of Georgia, Atlanta Division, Case No. 82–00237A.

7. As a matter of law, the acts of Respondent in failing to make full payment promptly of the agreed purchase prices for the perishable agricultural commodities it purchased, as alleged in the Complaint, and as amended by the Complainant in its Motion for Decision, constitute willful, flagrant and repeated violations of the PACA.

CONCLUSIONS

The position of the Complainant is that the statutory power lodged in the Secretary of Agriculture to effectuate regulation under the Perishable Agricultural Commodities Act is not circumscribed by the general language of the Bakruptcy Act. It was recognized in *R & D Investments, Inc., et al.*, (D.C., M.D. Pa.,

Bankruptcy Nos. BK–77–1226 and BK–77–1281, Sept. 26, 1978) that there apparently are no reported cases dealing with the problem of the clash between the Bankruptcy Act and the therein pertinent regulatory statute. In the aforesaid *R & D* case, supra, the Court was of the opinion:

> "Defendant (debtor) argues that the Government (plaintiff) has submitted or consented to the Bankruptcy Court jurisdiction. This ignores the real thrust of plaintiff's complaint which requests relief from the stay imposed on the grounds that the Bankruptcy Court lacks jurisdiction to stay the administrative proceedings. Defendant has likewise failed to substantiate the other two points raised in its motion to dismiss.
>
> Plaintiff has clearly established that the administrative proceeding stayed deals with violations of the Packers and Stockyears Act, a subject within the exclusive jurisdiction of the Department of Agriculture. There is, therefore, no jurisdictional power in the Bankruptcy court to stay administrative disciplinary proceedings taken by the Department."

Without reciting the full context thereof, reference is also made to the Department of Agriculture's published position set forth in Ruling on Certified Questions, *In re: Produce Brokers, Inc., Respondent,* PACA Docket No. 2–6081, filed November 8, 1982, likewise attached to the Complainant's Motion for Decision. Among other things, it is set forth therein:

> "* * * These 44 violations over a nine-month period, totalling $329, 224.21, are far more than is needed to[2] warrant a finding that respondent has committed repeated and flagrant[3] viola-

[2]*Reese Sales Co.* v. *Hardin*, 458 F.2d 183, 187 (9th Cir. 1972); *Zwick* v. *Freeman*, 373 F.2d 110, 115 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967); *Eastern Produce Co.* v. *Benson*, 278 F.2d 606, 610 n 6 (3d Cir. 1960); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1169 (1982), *appeal docketed*, No. 82–1843 (D.C. Cir. July 26, 1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1640 (1976), *aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978); *accord*, *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116 (1982), *appeal dismissed*, No. 82–4144 (2d Cir. Oct. 13, 1982); *In re V.P.C., Inc* , 41 Agric. Dec. 734, 740–44 (Apr. 14, 1982); *In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1156–57 (1981), *appeal docketed*, No. 81–4397 (5th Cir. Sept. 29, 1981); *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1135 (1981); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112 (1981), *aff'd mem.*, No. 81–1446 (D.C. Cir. Jan. 19, 1982); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 748 (1975), *aff'd mem.*, 549 F.2d 830 (D.C. cir.), *cert. denied*, 434 U.S. 920 (1977).

[3]*Reese Sales Co.* v. *Hardin*, 458 F.2d 183, 187 (9th cir. 1972); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1169–70 (1982), *appeal docketed*, No. 82–1843 (D.C.

tions of the Act. Accordingly, a finding of fact should be m that respondent has committed repeated and flagrant violat of § 2 of the Act without a hearing, in view of the implied missions in respondent's answer."

Said policy statement also stated: "Moreover, it has repe been held under the Act that all excuses are routinely rejec determining whether payment violations occurred or whether tions were willful since 'the Act calls for payment—not excus Said statement is supported by lengthy citation set forth belo

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Cir. July 26, 1982); *In re Carlton F. Stowe, Inc.*, 41 Agric Dec. 1116 (1982), *dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re V.P.C , Inc.*, 41 Agri 734, 740-44 (1982); *In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1 (1981), appeal docketed, No. 81-4397 (5th Cir. Sept. 29, 1981); *In Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1135 (1981); *In re Columbus Co., 40 Agric. Dec. 109, 1112-13 (1981), aff'd mem* , No. 81-1446 (D.C. Cir. J 1982); *In re John H. Norman & Sons Distrib Co.*, 37 Agric Dec. 705, (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31 (1976), *aff'd*, No. 76-1613 (9 Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re M. & H Produce Co* , 34 Dec. 700, 747 (1975), *aff'd mem.*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 43 920 (1977). *See*, also, *Zwick* v. *Freeman*, 373 F.2d 110, 115 (2d Cir.) (involvi continuation of business activities during a period when respondents kne were in serious financial difficulty), *cert. denied*, 389 U.S. 835 (1967).

[4]Not available.

[5]*In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1171 (1982), (non-payme cause of financial difficulties and respondent's bank froze its bank account), *docketed*, No. 82-1843 (D.C. Cir. July 26, 1982); *In re Carlton F. Stowe, I* Agric. Dec. 1116, 1129 (1982) (non-payment because of bankruptcy of anothe owing respondent $776,459.23), *appeal dismissed*, No. 82-4144 (2d Cir. O 1982); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746-47 (1982) (non-payment bec financial difficulties); *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1138-40 (1981) (non-payment because respondent suddenly and unexpectedly major sales account); *In re United Fruit and Vegetable Co.*, 40 Agric. Dec. 3 (1981) (non-payment because of financial difficulties), *aff'd*, No. 81-1554 (8 Jan. 21, 1982), *cert denied*, 50 U.S L.W. 3944 (U.S. June 1, 1982) (No. 81-19 *re Columbus Fruit Co.*, 40 Agric. Dec. 109, 113 (1981) (non-payment becau spondent lost a major sales account and a large supplier changed its course o ing with respondent, demanding cash on delivery), *aff'd mem.*, No. 81-1446 Cir. (Jan. 19, 1982); *In re Kafesak*, 39 Agric. Dec. 683, 685-86 (1980) (non-pa because of strike and failure of others to pay respondent), *aff'd*, No. 80-34 Cir. Dec. 18, 1981); *In re John H. Norman & Sons Distrib Co.*, 37 Agric. De 709-14 (1978) (non-payment because of failure of others to pay respondent) *Catanzaro*, 35 Agric. Dec. 26, 31 (1976) (non-payment because of railroad s *aff'd, No. 76-1613 (9th Cir. Mar. 9, 1977), printed in* 36 Agric. Dec. 467; *George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 266-68 (1973) (non-payme cause of financial difficulties), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 41 830 (1974); *accord, In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1157 (non-payment because of financial difficulties, including difficulty in collectin others), *appeal docketed*, No. 81-4397 (5th Cir. Sept. 29, 1981); *In re C. B. Inc.*, 40 Agric. Dec. 961 (1981) (non-payment because respondent lost a majo

Respondent's contentions have been amply answered by the Complainant in its Memorandum of Points and Authorities in Support of Motion for Decision on the Pleadings. Among the Respondent's arguments are those that this action falls within the scope of section 362 of the Bankruptcy Code and is therefore barred by the automatic stay; that one of the underlying purposes of the bankruptcy laws is to provide fresh start opportunities; and, that in this bankruptcy case "the end has not yet come. There has not been a confirmation or a rejection of the plan."

The Respondent has not cited authority for its arguments, and I am unaware of any decided cases by Federal Courts which would negate the position of the Department of Agriculture. The pleading herein, together with documents officially noticed, indicate that the Respondent does not seriously contest that it has unpaid produce debts, the payment of which is overdue. Respondent does contest the allegation that non-payment was willful, flagrant, or repeated. This contention has been laid to rest in the case of *In re: George Steinberg & Son, Inc.*, 32 A.D. 236 (1973); aff'd 491 F. 2d 988 (2d Cir. 1974); cert. den. 419 U.S. 830 (1974). In the present case, the Respondent must have known, or should have known, that its financial condition was such that it might not be able to pay the sellers of the produce. The failure to pay $624,505.47 to 74 sellers in 255 transactions is held to constitute flagrant and repeated violations, which warrants a revocation of Respondent's license.

Relying upon the statements set forth by the Department's Judicial Officer in the *Produce Brokers, Inc.*, case, "Ruling on Certified Questions", Docket No. 2-6081, the Complainant takes the position that this proceeding does not contravene the automatic stay provided in Section 362 of the Bankruptcy Act. The position of the Complainant is that a disciplinary proceeding for violations of the PACA is the use of the regulatory power of Government, and as such is covered by 11 U.S.C. sec. 362(b)(4). Unless the Department changes its position, or a Federal Court holds otherwise, this position of the Complainant is persuasive.

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account and three large suppliers would no longer extend credit), *aff'd mem.*, No. 81-2197 (3d Cir. Mar. 29, 1982), *cert denied*, No. 81-2207 (Oct. 4, 1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1632-33, 1641-42 (1976) (non-payment because of financial difficulties), *aff'd mem.*, 568 F.2d 772 (4th cir.), *cert. denied*, 439 U.S. 819 (1978); *In re Solt*, 35 Agric. Dec. 721, 723-24 (1976) (non-payment because of bankruptcy of another firm owing respondent over $130,000.00); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883, 1885 (1975) (non-payment because of financial difficulties); *In re Bailey Produce Co.*, 8 Agric. Dec. 1403, 1405 (1949) (non-payment because of financial difficulties); *In re Josie Cohen Co.*, 3 Agric. Dec. 1013, 1015 (1944) (non-payment because of financial difficulties).

Inasmuch as Section 525 of 11 U.S.C. clearly exempts the PACA from the strictures imposed by section 525, this proceeding can not be said to frustrate the fresh start policy provided for in section 525.

I agree with the position of the Complainant on brief that this proceeding is not premature. As set forth by the Complainant:

> "Respondent raised as its fourth affirmative defense the claim that "The filing and maintaining of this disciplinary proceeding is premature in view of 7 U.S.C. § 499d(a)." Respondent cannot prevail on this argument since this disciplinary proceeding is brought pursuant to section 8 of the PACA (7 U.S.C. § 499h) for violations of section 2 (7 U.S.C. § 499b).
>
> Section 499d(a) (section 4(a)) of the PACA provides in pertinent part:
>
> > "That the license of any licensee shall terminate upon said licensee, or in case the licensee is a partnership, any partner, being discharged as a bankrupt, unless the Secretary finds upon examination of the circumstances of such bankruptcy, which he shall examine if requested to do so by said licensee, that such circumstances do not warrant such termination;
>
> There is no mention in section 4(a) of the Act of proceedings brought pursuant to section 8 for violations of section 2(4) for failures to pay for perishable agricultural commodities purchased and received in interstate commerce. Rather, what is clearly contemplated is that if a licensee makes a separate application after its license has automatically terminated because it was discharged as a bankrupt, the Secretary may determine that the license should not terminate. There has been no showing such separate application was made, and we are unaware of one, but even if it were, it has no relevancy to this proceeding. *In re Carlton F. Stowe, Inc.*, 41 A.D. 1116, 1138–1143 91982) Rather, the determination pursuant to section 4(a) is separate from the prosecution of violations pursuant to section 8."

The evidence clearly shows that as a matter of law, the Respondent has committed willful, flagrant and repeated violations of the PACA. The Respondent has not raised a valid defense to its violations. The following Order is hereby issued.

ORDER

The Respondent's license is revoked.

This Decision and Order shall became final 35 days after service hereof unless appealed within 30 days as provided by the Rules of Practice and Procedure, 7 C.F.R. 1.130, *et seq.*

Copies hereof shall be served upon the parties.

[The decision and order became final April 7, 1983.—Ed.]

(No. 22,489)

In re: DiSETTE FRUIT & PRODUCE. PACA Docket No. 2-6178. Decided March 7, 1983.

Failure to pay promptly—Revocation of license—Default

Respondent failed to make full payment promptly for fruit and vegetables purchased in commerce which constitutes willful, repeated and flagrant violations of the Act for which respondent's license was revoked.

Edward M. Silverstein, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

DEFAULT DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*; hereinafter referred to as the "PACA"), instituted by a complaint filed on December 10, 1982, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period November 1981 through February 1982, respondent purchased and accepted, in interstate and foreign commerce, from 28 sellers, 71 lots of fruit and vegetables, all being perishable agricultural commodities, but failed to make fully payment promptly of the agreed purchase prices or balances thereof in the total amount of $260,282.00.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, DiSette Fruit & Produce, is a corporation, address is P.O. Box 926, Fairfield, Iowa, 52556.

2. Pursuant to the licensing provisions of the Act, license r 750878 was issued to respondent on December 27, 1974, v newed annually, and was next subject to renewal on or bef cember 27, 1982. However respondent's PACA license wa matically suspended on July 14, 1982, as provided in section the PACA (7 U.S.C. 499g(d)), when it failed to satisfy two r tion awards issued on June 8, 1982, (*Four Star Tomato, DiSette Fruit & Produce*, PACA Docket No. RD-82-166; *Packing Co.* v. *DiSette Fruit & Produce*, PACA Docket N 82-167), both reported at 41 Agri. Dec. 1253. These awards h been satisfied and the suspension of respondent's PACA lice mains in effect.

3. As more fully set forth in paragraph 5 of the complaint, the period November 1981 through February 1982, responde chased and accepted in interstate and foreign commerce f sellers, 71 lots of fruit and vegetables, all being perishable a tural commodities, but failed to make full payment promptly agreed purchase prices, or balances thereof, in the total am $260,282.00.

CONCLUSIONS

Respondent's failure to make full payment promptly with to the 71 transactions set forth in Finding of Fact No. 3, abo stitutes willful, repeated and flagrant violations of Section 2 PACA (7 U.S.C. 499b), for which the Order below is issued.

ORDER

Respondent's license is revoked.

This Order shall take effect on the eleventh day after thi sion becomes final.

Pursuant to the rules of Practice governing procedures un Act, this Decision will become final without further proc thirty-five days after service hereof, unless appealed to the tary by a party to the proceeding within thirty days after se provided in sections 1.139 and 1.145 of the Rules of Practice 1.139 and 1.145).

Copies hereof shall be served upon the parties. [The decis order became final April 18, 1983.-Ed.]

(No. 22,490)

In re: MARANO BROS. DUPAGE PRODUCE, INC. PACA Docket No. 2-6185. Decided March 7, 1983.

Failure to pay promptly—Publication of the facts—Default

Respondent failed to make full payment promptly for fruits and vegetables purchased in commerce which constitutes willful, repeated and flagrant violations of the Act. The facts and circumstances shall be published.

Edward M. Silverstein, for complainant.
Respondent, *pro se*

Decision by William J. Weber, Administrative Law Judge.

DEFAULT DECISION AND ORDER

PRELIMINARY STATMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "PACA,", instituted by a complaint filed on December 20, 1982, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period September 1981 through May 1982, respondent purchased and accepted, in interstate and foreign commerce, from 12 sellers, 50 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $161,871.05.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, Marano Bros. Du Page Produce, Inc., is a corporation, whose address is 26W333 St. Charles Road, Wheaton, Illinois 60187.

2. Pursuant to the licensing provisions of the PACA, license number 730221 was issued to respondent on August 30, 1972. This license was renewed annually, but terminated on August 30, 1981, pursuant to 7 U.S.C. 499d(a), when respondent failed to pay the required annual license fee. However, respondent continued to operate subject to the PACA.

3. As more fully set forth in paragraph 5 of the complaint, during the period September 1981 though May 1982, respondent purchased and accepted in interstate and foreign commerce from 12 sellers, 50 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $161,871.05.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 50 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the PACA (7 U.S.C. 499b), for which the Order below is issued.

ORDER

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. 499b), and the facts and circumstances set forth above shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to sections 1.139 and 1.145 of the Rules of Practice governing procedures under the PACA, (7 CFR 1.139 and 1.145), this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service.

Copies hereof shall be served upon parties.

[The decision and order became final April 18, 1983.-Ed.]

(No. 22,491)

In re: BANANAS, INC. PACA Docket No. 2-6064. Decided March 25, 1983.

Failure to pay and to pay promptly—Publication of the facts

Respondent failed to pay and to pay promptly for fruits and vegetables purchased in commerce which constitutes repeated and flagrant violations of the Act. The facts and circumstances shall be published.

Dennis Becker, for complainant.

James N Adams, Houston, Texas, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), in which Administrative Law Judge Victor W. Palmer filed an initial Decision and Order on February 2, 1983, publishing the finding that respondent has committed repeated and flagrant violations of § 2(4) of the Act (7 U.S.C. § 499b(4)) by failing to pay 26 sellers over $54,000.00 for produce purchased and accepted in interstate commerce during the period from August 1981 through November 1981, and failing to pay 13 sellers promptly for over $42,000.00 worth of produce during the same period.[1]

On March 1, 1983, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).[2] On March 21, 1983, the case was referred to the Judicial Officer for decision.

For the reasons set forth below, the initial Decision and Order is upheld. The findings are taken verbatim from the initial decision.

FINDINGS OF FACT

1. Respondent, Bananas, Inc., is a corporation whose address is 3169 Produce Row, Houston, Texas 77023.

2. Pursuant to the licensing provisions of the Act, license no. 660966 was issued to respondent on September 30, 1965. This license was renewed annually, but terminated on September 30, 1981, pursuant to section 4(a) of the Act (7 U.S.C. 499(d)(a)), when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, respondent, during the period August 1981 through November 1981, purchased 189 lots of fruits and vegetables from 39 sellers in inter-

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[1] *See generally* Campbell, "The Perishable Agricultural Commodities Act Regulatory Program," in 1 Davidson, Agricultural Law, ch. 4 (1981 and May 1982 Supp.), and Becker and Whitten, "Perishable Agricultural Commodities Act," in 10 Harl, Agricultural Law, ch. 72 (1980 and May 1982 Supp.).

[2] The career position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app., at 764 (1976). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

state and foreign commerce, which commodities were received and accepted by respondent, but for which respondent failed to make payment of the agreed purchase prices to 26 sellers in the amount of $54,045.43, and failed to make prompt payment of the agreed purchase prices to 13 sellers in the amount of $42,464.27.[3]

CONCLUSIONS

Respondent contends on appeal that the record does not show who the unpaid sellers are as of the date of the order. However, respondent admits in its answer that approximately 56% of the $96,509.70 alleged to be due in the complaint (or over $54,000.00) has not been paid. Accordingly, it is not necessary to set forth the details as to respondent's payment violations.

Respondent also contends that it has reached settlement agreements with its creditors. But the agreement provide only for partial payment. It has repeatedly been held that where a seller agrees to accept partial payment of the purchase price in full satisfaction of a debt, *e.g.*, because of the debtor's bankruptcy, that does not constitute full payment, and does not negate a violation of the Act.[4]

Leaving aside respondent's numerous late payments, which by themselves would warrant a lengthy suspension order (*see In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372, 1385-88 (1979), *aff'd per curiam*, 630 F.2d 370, 374 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981)), respondent has totally failed to pay for over $54,000 worth of perishable agricultural commodities. Failure to pay for produce is a very serious violation of the Perishable Agricultural Commodities Act which results in an order revoking the license of the offender[5] since it is the "goal [of the Perishable Agri-

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[3]Complainant suggests slight changes in the figures, which are not adopted since they would make no difference in the outcome of this proceeding.

[4]*In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1163-65 (1982), *appeal docketed*, No. 82-1843 (D.C. Cir. July 26, 1982); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1136 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 401 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 102 S. Ct. 2299 (1982); *In re Kafcsak*, 39 Agric. Dec. 683, 685 (1980), *aff'd*, No. 80-3406 (6th Cir. Dec. 18, 1981), *printed in* 41 Agric. Dec. 88 (1982); *In re Baltimore Tomato Co.*, 39 Agric. Dec. 412, 413-14 (1980); *In re Hal Merdler Produce, Inc.*, 37 Agric. Dec. 809, 810 (1978); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1633, 1639-40 (1976), *aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1884-87 (1975); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 733-40 (1975), *aff'd mem.*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1887-88, 1892, 1896, 1899-1900 (1974), *aff'd*, 524 F.2d 1255, 1258 (5th Cir. 1975).

[5]*E.g.*, *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2425 (1982), *appeal docketed*, No. 82-3826 (6th Cir. Dec. 23, 1982); In re *Carlton F. Stowe, Inc.*, 41

"Failure to pay violations not only adversely affect the party who is not paid for produce, but such violations have a tendency to snowball. 'On occasions, one licensee fails to pay another licensee who is then unable to pay a third licensee.' This could have serious repercussions to producers, licensees and consumers."[8]

If the violator who fails to pay for produce does not have a license in effect, an order is issued finding that the person has engaged in repeated or flagrant violations of the Act,[9] which has the same effect on the violator and on persons responsibly connected with the violator as a license revocation.[10]

Dec. 773, 796, 801 (1975), *aff'd*, 540 F 2d 518 (1st Cir. 1976); *In re M & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd mem.*, 549 F.2d 830 (D.C. Cir.), *cert denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc* , 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc* , 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd mem.*, 510 F.2d 966 (4th Cir. 1975); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

[8] *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2426 (1982), *appeal docketed*, No. 82-3826 (6th Cir. Dec. 23, 1982); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1169 (1982), *appeal docketed*, No. 82-1843 (D.C. Cir. July 26, 1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 114 (1981), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan 19, 1982), *printed in* 41 Agric. Dec. 89 (1982); *accord*, *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1134 (1981). Although the Act is primarily to protect producers, it "is also 'for the protection of consumers' (H.R. Rep. No. 1196, 84th Cong., 1st Sess., p. 2), inasmuch as increased industry costs resulting from failures to pay or other unfair practices are ultimately borne by consumers." *In re Catanzaro*, 35 Agric. Dec. 26, 33 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467.

[9] *E.g* , *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2426 (1982), *appeal docketed*, No. 82-3826 (6th Cir. Dec. 23, 1982); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1168-92 (1982), *appeal docketed*, No. 82-1843 (D.C. Cir. July 26, 1982); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 748 (1982); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1133-34, 1151 (1981); *In re C.B. Foods, Inc.*, 40 Agric Dec. 961, 968-71 (1981), *aff'd mem.*, 681 F.2d 804 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 70 (1982); *In re Kafesak*, 39 Agric. Dec. 683, 686-87 (1980), *aff'd*, No. 80-3406 (6th Cir. Dec. 18, 1981), *printed in* 41 Agric. Dec. 88 (1982); *In re John H. Norman & Sons Distrib. Co* , 37 Agric. Dec. 705, 714-21 (1978); *In re Pappas Produce, Inc.*, 36 Agric. Dec. 684, 694-96 (1977); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1633, 1643-45 (1976), *aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1885-89 (1975); *In re M & H. Produce Co.*, 34 Agric. Dec. 700, 748-52 (1975), *aff'd mem.*, 549 F.2d 830 (D.C Cir.), *cert denied*, 434 U.S. 920 (1977); *In re Marvin Tragash Co.*, 33 Agric. Dec 1884, 1896-1914 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 253, 266-70 (1973), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

[10] *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 748-49 (1982); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1151-52 (1981); *In re John H Norman & Sons Distrib.*

cultural Commodities Act] that only financially responsible persons should be engaged in the perishable agricultural commodities industry,"[6] and it is the policy of this Department to impose severe sanctions for serious violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings in recent years.

The basis for the Department's sanction policy is set forth at great length in numerous decisions, *e.g.*, *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974), set forth in the Appendix to this decision.[7] The Department's sanction policy is also discussed at length in *In re Esposito*, 38 Agric. Dec. 613, 624-65 (1979).

Agric. Dec. 1116, 1126 (1982), *appeal dismissed*, No. 82-4144 (2d Cir. Oct 13, 1982); *In re Wayne Cusimano, Inc* , 40 Agric. Dec. 1154, 1156-59 (1981), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792, 793 (1981); *In re United Fruit & Vegetable Co* , 40 Agric. Dec. 396, 401-02 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 102 S. Ct. 2299 (1982), *In re Columbus Fruit Co* , 40 Agric Dec. 109, 112 (1981), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Baltimore Tomato Co* , 39 Agric. Dec. 412, 414-16 (1980); *In re Hal Merdler Produce, Inc.*, 37 Agric. Dec. 809, 811-12 (1978); *In re Solt*, 35 Agric. Dec. 721, 723, 726 (1976), *In re Catanzaro*, 35 Agric. Dec. 26, 30-36 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *accord, In re Kafesak*, 39 Agric. Dec. 683, 686-87 (1980), *aff'd*, No. 80-3406 (6th Cir. Dec. 18, 1981), *printed in* 41 Agric. Dec. 88 (1982).

[6]*Marvin Tragash Co.* v. *USDA*, 524 F.2d 1255, 1257 (5th Cir. 1975); *accord, Chidsey* v. *Guerin*, 443 F.2d 584, 588-89 (6th Cir. 1971), *Zwick* v. *Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert denied*, 389 U.S. 835 (1967); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2425 (1982), *appeal docketed*, No. 82-3826 (6th Cir. Dec. 23, 1982); *In re Finer Foods Sales Co* , 41 Agric. Dec. 1154, 1168 (1982), *appeal docketed*, No. 82-1843 (D.C. Cir. July 26, 1982); *In re Connecticut Celery Co* , 40 Agric. Dec. 1131, 1133 (1981); *In re Mel's Produce, Inc.*, 40 Agric Dec. 792, 793 (1981); *In re United Fruit & Vegetable Co* , 40 Agric. Dec. 396, 402 (1981), *aff'd*, 668 F.2d 983 (8th cir.), *cert. denied*, 102 S. Ct. 2299 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112 (1981), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982).

[7]Severe sanctions issued pursuant to this policy were sustained, e.g., in *In re Collier*, 38 Agric Dec. 957, 971-72 (1979), *aff'd*, 624 F.2d 190 (9th Cir 1980); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D. N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem* , 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk* v. *Bergland*, 570 F.2d 701 (8th cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd mem* , 575 F.2d 879 (5th Cir. 1978); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec 467; *In re Maine Potato Growers, Inc* , 34 Agric.

Sess., p. 2). "The law has fostered an admirable degree of dependability and fairness in this industry * * *. * * * In spite of the strictness of some of the provisions of the law, the act and its administration by the Department of Agriculture have won the almost unanimous approval of this important food distributing industry and now have its virtually undivided support" (*ibid.*).[16]

In *Birkenfield* v. *United States*, 369 F.2d 491, 494 (C.A. 3), the Court stated:

> The object of the Act is to suppress unfair and fraudulent practices in the industry. Enacted in 1930, the Act is regarded today as one of the government's most successful regulatory programs, and the Act has received enthusiastic support from members of the regulated industry.[17]

The "goal of the [Perishable Agricultural] Commodities Act [is] that only financially responsible persons should be engaged in the businesses subject to the Act." *Marvin Tragash Co.* v. *United States Dept. of Agr.* [524] F.2d [1255] (C.A. 5), No. 75-1481, decided December 24, 1975. The purpose of the Act was stated in *Zwick* v. *Freeman*, 373 F.2d 110, 116 (C.A. 2), certiorari denied, 389 U.S. 835, as follows:

> The Perishable Agricultural Commodities Act is designed to protect the producers of perishable agricultural products who in many instances must send their products to a buyer or commission mer-

[16] *Accord*, S Rep. No. 2507, 84th Cong., 2d Sess. 3-4 (1956); *United States* v. *William B Mandell Co*, 242 F. Supp. 873, 875 (E.D. Pa. 1965); *In re Columbus Fruit Co*, 40 Agric. Dec. 109, 113-14 (1981), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan 19, 1982), *printed in* 41 Agric. Dec. 89 (1982).

[17] In a Congressional report as to a 1962 amendment to the Act, it is stated (H.R Rep. No. 1546, 87th Cong., 2d Sess. 3 (1962): "Testimony of the shippers, brokers, wholesalers, and other elements of the trade in fresh and frozen fruits and vegetables who have been operating under this act is enthusiastically and almost unanimously in its support. It has brought a high degree of

chant who is thousands of miles away. It was enacted to provide a measure of control over a branch of industry which is almost exclusively in interstate commerce, is highly competitive, and presents many opportunities for sharp practice and irresponsible business conduct. H. Rept. No. 1196, 84th Cong. 1st Sess. 2 (1955).

* * *

Revocation of respondent's license, in view of his repeated and flagrant violations of the Act, is not only authorized by the Act (7 U.S.C. 499h(a)) [footnote omitted], but is also consistent with other provisions of the Act, which are not applicable here. . . . Similarly, if a licensee fails to pay a reparation order under the Act, his license is automatically suspended until the reparation order is paid, irrespective of whether he is unable to pay because of circumstances beyond his control (7 U.S.C. 499g(d)).

* * *

If a licensee is going to extend credit to its purchasers in this regulated industry, it must be adequately capitalized to be able to sustain any losses that result. If losses occur which jeopardize a licensee's ability to meet its obligations, it must immediately obtain more capital, or suffer the consequences if violations occur. In this regulated industry, the risk of loss should be taken by the banking community, whose business it is to supply risk capital, or by stockholders or other risk takers. Other licensees engaged in business in this vital agricultural marketing system should not be subjected to the risk resulting from respondent's undercapitalization or bad debt experience.

The peculiar vulnerability of producers of perishable agricultural commodities and livestock, and the importance of the Department's regulatory programs to assure payment for these commodities, were again recognized by Congress in the recent Bankruptcy Act amendments, in which it is provided (92 Stat. 2549, 2593):

yards Act, 1921 (7 U.S.C. 181-229), and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943 (57 Stat. 422; 7 U.S.C. 204),[8] a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

Congressman Foley, Chairman of the House Agriculture Committee, explained the need for the foregoing special provisions applicable to the Perishable Agricultural Commodities Act and the Packers and Stockyards Act as follows (Proceedings and Debates of the 95th Cong., 1st Sess., Vol. 19, pp. H 11761-H 11762 (October 28, 1977) [, now 123 Cong. Rec. 35671-72 (1977)]):

Under the Packers and Stockyards Act and the act of July 12, 1943, persons purchasing livestock in commerce are required to conduct their businesses in a financially responsible manner, and market agencies and dealers * * * are required to have a bond and to pay for all livestock purchased. The licenses of market agencies and dealers may be suspended if they become insolvent. Packers may be ordered to cease and desist from failing to pay for livestock and packers who become insolvent may be ordered to cease and desist from operating except

Under the Perishable Agricultural Commodities Act, commission merchants, dealers, and brokers are required to be licensed and to account and pay promptly for all commodities purchased. Failure to pay can result in suspension of a license, and flagrant and repeated failure may result in revocation of a license. Licensees may in certain circumstances be required by the Secretary to post a bond as evidence of financial responsibility. And the Secretary may refuse to issue licenses to persons who have violated the act or have been convicted of a felony.

The Committee on Agriculture has no quarrel with the "fresh-start" philosophy underlying this bill. However, that philosophy is not new and has heretofore been one of the principal purposes of the bankruptcy laws. Because of the peculiar vulnerability of producers of perishable agricultural commodities and livestock, Congress has seen fit, notwithstanding this philosophy, to enact and from time to time amend the Perishable Agricultural Commodities Act, the Packers and Stockyards Act, and the Act of July 12, 1943.

The Committee on Agriculture conducted oversight hearings on the PACA program twice in the 94th Congress and found that the program is generally operating well and is serving its purpose in protecting the producers of perishable agricultural commodities and the public. Last year, after extensive hearings, Congress enacted Public Law 94-410 which made extensive amendments to the Packers and Stockyards Act and the act of July 12, 1943, to assist the Secretary to prevent recurrence of the catastrophic losses to livestock producers which attended the bankruptcies of several large packers in the past few years. Both of these programs must be continued if this Nation is to continue to have a ready source of nutritious food at prices which are reasonable to both the producer and the consumer.

Considering all of the circumstances, there is a sound basis for

harsh as it would seem. For example, many persons who suffer a financial loss or otherwise become in a precarious financial position continue to operate for many months and even increase their business substantially, without obtaining new capital, thereby subjecting many persons who sell produce to them to the risk of financial loss. Such conduct has repeatedly been characterized as "flagrant." See *In re John H. Norman & Sons Distributing Co.*, 37 Agr Dec 705, 713 (1978); *In re Atlantic Produce Co.*, 35 Agr Dec 1631, 1640-1641 (1976), [*aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978)]; *In re Sam Leo Catanzaro*, 35 Agr Dec 26, 31 (1976), affirmed *sub nom. Catanzaro* v. *United States and Butz*, No. 76-1613 (C.A. 9), decided March 9, 1977 (36 Agr Dec 467); *In re M. & H. Produce Co.*, 34 Agr Dec 700, 747 (1975), [*aff'd mem.*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977); *In re George Steinberg & Son*, 32 Agr Dec 236, 243-244 (1973), affirmed *sub nom. George Steinberg & Son, Inc.* v. *Butz*, 491 F.2d 988 (C.A. 2), certiorari denied, 419 U.S. 830.

As stated in *Zwick* v. *Freeman*, 373 F.2d 110, 115 (C.A. 2), certiorari denied, 389 U.S. 835—

> it is inconceivable that petitioners were unaware of their financial condition and unaware that every additional transaction they entered into was likely to result in another violation of the Commodities Act. It would be hard to imagine clearer examples of "flagrant" violations of the statute than were exemplified by petitioners' conduct.

In addition, many firms which experience losses that result in their ultimate failure to pay experience such losses because they were not sufficiently cautious in extending credit. See, *e.g.*, *In re J. H. Norman & Sons Distributing Co.*, 37 Agr Dec 705, 708-709 (1978).

But even where the failure to receive payment could not have been reasonably foreseen, and the firm immediately discontinues business (being unable to pay all of its creditors), if "a licensee is going to extend credit to its purchasers in this regulated industry, it must be adequately capitalized to be able to sustain any losses that result." *In re J. H. Norman & Sons Distributing Co.*, 37 Agr Dec 705, 719 (1978).

Undoubtedly there have been some cases

v. Freeman, supra, 373 F.2d at 118. See, also, *United States v. Dotterweich*, 320 U.S. 277, 284-285; *Callaghan v. Reconstruction Finance Corp.*, 297 U.S. 464, 468; *Dairymen's League Co-operative Ass'n. v. Brannan*, 173 F.2d 57, 66 (C.A. 2), certiorari denied, 338 U.S. 825; *General Ice Cream Corp. v. Benson*, 113 F. Supp. 107, 108 (N.D. N.Y.), affirmed, *per curiam*, 217 F.2d 646 (C.A. 2)." *In re George Steinberg & Son*, 32 Agr Dec 236, 248 (1973), affirmed *sub nom. George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (C.A. 2), certiorari denied, 419 U.S. 830.

As shown above, pages 15-17, in the quotation from the *Esposito* case, in the 1978 Bankruptcy law, Congress specifically exempted two regulatory programs—the Perishable Agricultural Commodities Act and the Packers and Stockyards Act—from the provisions of § 525 of the Bankruptcy law (11 U.S.C. § 525 (Supp. III 1979)) that otherwise would have prevented the revocation of a license because of bankruptcy or the failure to pay a debt dischargeable under the Bankruptcy law.

Section 525 of the 1978 Bankruptcy law was enacted to codify *Perez* v. *Campbell*, 402 U.S. 637 (1971), which held that a State would frustrate the Congressional policy of a fresh start for a debtor if it were permitted to refuse to renew a drivers license because a tort judgment resulting from an automobile accident had been unpaid as a result of a discharge in bankruptcy. Section 525 of the 1978 Bankruptcy law extends the *Perez* holding to both state and federal governmental agencies. The legislative history of the 1978 Bankruptcy law states that § 525 codifies the result of *Perez* (S. Rep. No. 95-989, 95th Cong., 2d Sess. 81 (1978); H.R. Rep. No. 95-959, 95th Cong., 1st Sess. 366-67 (1977)). But as shown above, the Perishable Agricultural Commodities Act regulatory program was expressly excepted from § 525.

Prior to the 1978 Bankruptcy law, it was held that where a respondent's failure to pay under the Perishable Agricultural Commodities Act results from bankruptcy, there is no unconscionable or excessive conflict between the Department's disciplinary action revoking the respondent's license under the Perishable Agricultural Commodities Act and the bankruptcy law.[18] As shown above, § 525

of the 1978 Bankruptcy law expressly preserves the right of the Secretary to revoke a bankrupt's license under the Perishable Agricultural Commodities Act because of debts dischargeable in bankruptcy.

The Chairman of the House Committee on Agriculture, who proposed the amendment exempting the Perishable Agricultural Commodities Act and the Packers and Stockyards Act from the provisions of § 525 of the 1978 Bankruptcy law, stated (123 Cong. Rec. 35671 (1977)):

> The Agriculture Committee has no quarrel with the basic philosophy underlying this provision which is to prevent discrimination against a person solely—and I emphasize the word "solely"—because that person has undergone bankruptcy. However, I am concerned that, without clarification, the section might be interpreted in such a way as to prevent the Secretary of Agriculture from carrying out his statutory responsibilities under the Perishable Agricultural Commodities Act, the Packers and Stockyards Act, and the supplementary packers and stockyards legislation contained in the Act of July 12, 1943, 7 U.S.C. 204. This amendment is simply designed to clarify the fact that section 525 does not in any way interfere with administration by the Secretary of Agriculture of these statutes.

Other statements made at the same time by the Chairman of the House Committee on Agriculture are set forth above (pp. 16-17) in the lengthy quotation from the *Esposito* case, including the Chairman's statement that, under the Perishable Agricultural Commodities Act, "[f]ailure to pay can result in suspension of a license, and flagrant and repeated failure may result in revocation of a license" (123 Cong. Rec. 35672 (1977)).

In addition, shortly before the House agreed to amend § 525 of the 1978 Bankruptcy law by excepting the Perishable Agricultural Commodities Act and the Packers and Stockyards Act from the provisions that otherwise would have precluded license revocations

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(1974); and *see In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2433-40 (1982), *appeal docketed*, No. 82-3826 (6th Cir. Dec. 23, 1982); *In re Finer Foods Sales Co*., 41 Agric. Dec. 1154, 1176-82 (1982), *appeal docketed*, No. 82-1843 (D C. Cir. July 26, 1982); *In re Connecticut Celery Co.*, 40 Agric. Dec. [illegible] *Foods, Inc.*, [illegible]

solely because of bankruptcy or debts dischargeable in bankruptcy, Mr. Panetta stated (123 Cong. Rec. 35672 (1977)):

> I commend the gentlemen from Washington (Mr. Foley), the distinguished chairman of the Committee on Agriculture, for offering this amendment. As the gentleman knows, I will be offering a complementary amendment with regard to section 303 that will in effect carry on the basic thrust of the gentleman's amendment.
>
> The Perishable Agricultural Commodities Act is the mainstay of the fresh fruit and vegetable market. What these amendments attempts to do is to restore the authority of the Secretary of Agriculture under that law.

Shortly later, and immediately before the House agreed to the amendment excepting the Perishable Agricultural Commodities Act from § 525, Mr. Butler stated (123 Cong. Rec. 35673 (1977)):

> Mr. BUTLER. Mr. Chairman, I would like to note that section 525 of the new Bankruptcy Code by its very terms applies only in situations in which governmental units, either in hiring or in administering licensing programs, discriminate solely on the basis of whether a person is, or has been, a bankrupt. The gentleman from Washington (Mr. Foley) correctly points out that the section applies only where the discrimination is practiced "solely" on that basis.
>
> I am told that lawyers at the Agriculture Committee and in the General Counsel's Office at the Department of Agriculture are nevertheless of the opinion that, without clarification, section 525 might be interpreted to prevent the Secretary from taking necessary regulatory actions under the Perishable Agricultural Commodities Act, the Packers and Stockyards Act, and the act of July 12, 1943, 7 U.S.C. 204. It is difficult for me to understand this interpretation. As noted in our report, it was never the intention of the Judiciary Committee to interfere with legitimate regulatory objectives. However, if section 525 is susceptible to such interpretations, I am glad of this clarification.

ruptcy law, and is not dependent upon any bankruptcy related considerations, Congress decided that in order to be sure that the Secretary's authority would not be diminished, § 525 of the 1978 Bankruptcy law should be amended to expressly authorize the continuation of the Secretary's license revocation and violation publication authority under the Perishable Agricultural Commodities Act, where the violations involve debts dischargeable in bankruptcy.

According, even if respondent's financial condition had resulted in bankruptcy, it would have been no defense here.

Respondent has submitted pleas for leniency from a number of its creditors, but such pleas are routinely rejected.[19] The particular suppliers to whom respondent is indebted have a strong motive for wanting a lenient sanction, hoping that it will result in additional payments on their claims. But the Secretary must consider the broader public interest, involving thousands of suppliers and licensees throughout the country. If lenient sanctions were imposed in the case of serious and flagrant violations of the Act for the benefit of a few of respondent's creditors, the sanctions would not have a strong deterrent effect and, therefore, such a policy would be contrary to the public interest.

For the foregoing reasons, a finding should be published that respondent has committed repeated and flagrant violations of § 2(4) of the Act.

ORDER

Respondent, Bananas, Inc., has committed repeated and flagrant violations of § 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)). The facts and circumstances set forth above shall be published.

This order shall become effective on the 30th day after service on the respondent.

APPENDIX

Excerpt from In re Worsley, 33 Agric. Dec. 1547, 1556-71 (1974). Excerpt omitted.—Ed.]

(No. 22,492)

In re: CHEF'S BEST FOODS. PACA Docket No. 2-6062. Decided April 13, 1983.

Failure to pay and to pay promptly—Revocation of license—Consent

Respondent failed to pay and to pay promptly for perishable agricultural commodities purchased in commerce which constitutes willful, flagrant and repeated violations of the Act for which respondent's license was revoked.

Dennis Becker, for complainant.
Bertram H. Ross, Los Angeles, California, for respondent.

Decision by John G. Liebert, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*; hereinafter referred to as the "Act"), instituted by a complaint filed on July 13, 1982, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period March 1981 through September 1981, Respondent, Chef's Best Foods, purchased and accepted in interstate and foreign commerce from 30 sellers, 125 lots of fruits and vegetables, but failed to make full payment promptly of the agreed purchase prices in the amount of $333,843.44.

A copy of the complaint was served upon Respondent on July 16, 1982. Respondent filed an answer on August 9, 1982, in which it admitted having failed to make full payment of $63,552.58 to four sellers for 22 lots of produce and failing to make full payment promptly of $270,290.86 to 30 sellers for purchases of 125 lots of produce in interstate and foreign commerce. Respondent and Complainant have now agreed to the entry of a consent decision and order. Therefore, pursuant to Section 1.138 of the Rules of Practice (7 CFR 1.138), the following decision and order is issued without further procedure or hearing.

renewed annually and next is subject to renewal on or before June 10, 1983.

3. The Secretary has jurisdiction over the subject matter.

4. As set forth more fully in paragraph 5 of the complaint Respondent, during the period March 1981 through September 1981, purchased 125 lots of perishable agricultural commodities from 30 sellers in interstate and foreign commerce, which commodities were received and accepted by respondent, but for which respondent has failed to make full payment of the agreed purchase prices to four sellers in the amount of $63,552.28 and failed to make full payment promptly of the agreed purchase prices to all 30 sellers in the amount of $270,290.86.

CONCLUSIONS

Respondent's failure to pay four sellers a total of $63,552.58 for purchases of 22 lots of perishable agricultural commodities in interstate and foreign commerce and failure to make full payment promptly to 30 sellers in the amount of $270,290.86 for purchases of 125 lots of perishable agricultural commodities in interestate and foreign commerce, as set forth in Findings of Fact 3 above, constitutes willful, flagrant, and repeated violations of section 2(4) of the Act (7 U.S.C. 499b(4)) for which revocation of respondent's license is the appropriate sanction, and for which the order below is issued.

ORDER

Respondent's license is revoked.

This order shall become effective upon issuance.

The parties hereto have waived their rights to appeal from this order by signing below.

Copies hereof shall be served upon the parties.

MISCELLANEOUS ORDERS ISSUED BY
DONALD A. CAMPBELL, JUDICIAL OFFICER

(No. 22,493)

In re: WAYNE CUSIMANO, INC. PACA Docket No. 2-5531. Order issued April 1, 1983.

States Court of Appeals for the Fifth Circuit (692 F.2d 1025 (5th Cir. 1982)) and that the respondent has failed to petition for a writ of certiorari within 90 days from the date of the December 6, 1982, judgment by the court, it is hereby ORDERED THAT:

1. The Stay Order of October 5, 1981, is vacated; and

2. Respondent's license is revoked, effective ten (10) days from the date of this Order.

Copies of this Order shall be served upon the parties.

(No. 22,494)

In re: MELVIN BEENE PRODUCE CO. PACA Docket No. 2-5845. Order issued April 18, 1983.

MOTION FOR STAY ORDER GRANTED

Complainant hereby moves for the issuance of a stay effective December 23, 1982 of the Decision and Order issued December 2, 1982 in this matter pending proceedings for judicial review. Motion granted.

REPARATION DECISIONS

(No. 22,495)

SIX L'S PACKING COMPANY, INC. *v.* WINSTON C. BAILEY d/b/a CLAUDE BAILEY PRODUCE COMPANY. PACA Docket No. 2-6042. Decided April 11, 1983.

F.O.B. Sale—Acceptance—Failure to prove breach of contract—Liable for full contract price

Complainant sold to respondent 24 flats of tomatoes which respondent received and accepted. Respondent failed to prove damages due to breach of contract. Therefore, respondent is obligated to complainant for the full contract price.

Edward M. Silverstein, Presiding Officer.
Complainant and respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $156.00, in connection with a shipment of cherry tomatoes in interstate commerce.

A copy of the formal complaint was served upon respondent, and a copy of the Department's report of investigation was served upon both parties. Respondent filed an answer denying any liability to complainant.

Since the amount claimed as damages did not exceed $15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Pursuant to this procedure, the verified pleadings of the parties as well as the Department's report of investigation are considered part of the evidence in the case. In addition, the parties were given the opportunity to file further evidence by way of sworn statements. However, neither party filed such a statement, nor did either party file a brief.

FINDINGS OF FACT

3. On or about November 1, 1981, in the course of interstate commerce, complainant sold 24 flats of cherry tomatoes to respondent at an f.o.b. price of $6.50, for a total f.o.b. price of $156.00. Said contract was negotiated through Mr. Branch Mahaffey, acting as broker, who did not issue a brokers standard memorandum of sale. Though respondent attempted to pick up the tomatoes earlier, he was not able to take delivery of the tomatoes until November 4, 1981. While it is not known exactly where respondent took delivery of the tomatoes, the tomatoes were originally shipped from Donaldsonville, Georgia.

4. The formal complaint was filed April 27, 1982, which was within nine months of when the cause of action stated herein accrued.

CONCLUSIONS

The dispute herein concerns 24 flats of tomatoes which respondent admits receiving and accepting from complainant. Respondent claims that he had entered into the contract with Mr. Branch Mahaffey as principal, that the original agreement was for 126 flats not 24 flats, and that the 24 flats delivered were not in saleable condition. However, respondent does not deny receiving and accepting the 24 flats of tomatoes from complainant under the contract he claims to have entered into on November 1, 1981, with Mr. Mahaffey. Thus, even if he had entered into a contract with Mr. Mahaffey as a principal, he must have agreed to amending said contract to allow complainant to support Mr. Mahaffey. He is thus bound by the financial terms of the contract about which there does not appear to be any dispute.

Having accepted the 24 flats of cherry tomatoes, respondent is obligated to complainant for the contract price less any provable damages which may have occurred as result of a breach of contract by complainant. The burden of proving such a breach and consequential damages is on respondent. *Quality Melon Sales* v. *Savioli*, 34 Agric. Dec. 517 (1975). Respondent has failed to sustain this burden of proof because it has failed to proffer any evidence on the issue of damages. Thus, even if we decided the issues relating to the alleged breaches of contract in respondent's favor, we would have to decide the issue of damages against him.

REPARATION DECISIONS

(No. 22,495)

SIX L'S PACKING COMPANY, INC. *v.* WINSTON C. BAILEY d/b/a CLAUDE BAILEY PRODUCE COMPANY. PACA Docket No. 2-6042. Decided April 11, 1983.

F.O.B. Sale—Acceptance—Failure to prove breach of contract—Liable for full contract price

Complainant sold to respondent 24 flats of tomatoes which respondent received and accepted. Respondent failed to prove damages due to breach of contract. Therefore, respondent is obligated to complainant for the full contract price.

Edward M. Silverstein, Presiding Officer.
Complainant and respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $156.00, in connection with a shipment of cherry tomatoes in interstate commerce.

A copy of the formal complaint was served upon respondent, and a copy of the Department's report of investigation was served upon both parties. Respondent filed an answer denying any liability to complainant.

Since the amount claimed as damages did not exceed $15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Pursuant to this procedure, the verified pleadings of the parties as well as the Department's report of investigation are considered part of the evidence in the case. In addition, the parties were given the opportunity to file further evidence by way of sworn statements. However, neither party filed such a statement, nor did either party file a brief.

FINDINGS OF FACT

3. On or about November 1, 1981, in the course of interstate commerce, complainant sold 24 flats of cherry tomatoes to respondent at an f.o.b. price of $6.50, for a total f.o.b. price of $156.00. Said contract was negotiated through Mr. Branch Mahaffey, acting as broker, who did not issue a brokers standard memorandum of sale. Though respondent attempted to pick up the tomatoes earlier, he was not able to take delivery of the tomatoes until November 1, 1981. While it is not known exactly where respondent took delivery of the tomatoes, the tomatoes were originally shipped from Donaldsonville, Georgia.

4. The formal complaint was filed April 27, 1982, which was within nine months of when the cause of action stated herein accrued.

CONCLUSIONS

The dispute herein concerns 24 flats of tomatoes which respondent admits receiving and accepting from complainant. Respondent claims that he had entered into the contract with Mr. Branch Mahaffey as principal, that the original agreement was for 126 flats not 24 flats, and that the 24 flats delivered were not in saleable condition. However, respondent does not deny receiving and accepting the 24 flats of tomatoes from complainant under the contract he claims to have entered into on November 1, 1981, with Mr Mahaffey. Thus, even if he had entered into a contract with Mr. Mahaffey as a principal, he must have agreed to amending said contract to allow complainant to support Mr. Mahaffey. He is thus bound by the financial terms of the contract about which there does not appear to be any dispute.

Having accepted the 24 flats of cherry tomatoes, respondent is obligated to complainant for the contract price less any provable damages which may have occurred as result of a breach of contract by complainant. The burden of proving such a breach and consequential damages is on respondent. *Quality Melon Sales* v. *Sarrolt*, 34 Agric. Dec. 517 (1975). Respondent has failed to sustain this burden of proof because it has failed to proffer any evidence on the issue of damages. Thus, even if we decided the issues relating to the alleged breaches of contract in respondent's favor, we would have to decide the issue of damages against him.

section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within 30 days from the date of this order, respondent shall pay complainant $156.00 with interest thereon at the rate of 13 per cent from December 1, 1981, until paid.

Copies of this order shall be served upon the parties.

(No. 22,496)

TEPEYAC PRODUCE, INC. *v.* CUMBERLAND PRODUCE CO., INC. PACA Docket No. 2-6074. Decided April 11, 1983.

F.O.B. Sale—Acceptance—Suitable shipping condition warranty

Complainant sold and shipped 84 crates of bell peppers to respondent who received and accepted the shipment Respondent failed to prove that transportation services and conditions were normal therefore, the suitable shipping condition warranty does not apply to this shipment. Because respondent accepted the shipment it is liable for the full purchase price.

George S. Whitten, Presiding Officer.
Complainant and respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A formal complaint was filed on May 24, 1982, in which complainant sought reparation in the sum of $2,234.40 in connection with two shipments of perishable produce in interstate commerce.

A copy of the formal complaint and a copy of the Department's report of investigation were served upon respondent. A copy of the report of investigation was also served upon complainant. Respondent filed an answer to the complaint and enclosed a check in the amount of $520.80 in full payment of one of the transactions which was the subject of the complaint and another
$45.60 which

Rules of Practice (7 CFR 47.20) is applicable. Under this procedure, the verified pleadings of the parties are considered a part of the evidence herein, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Tepeyac Produce, Inc., is a corporation whose address is P.O. Box 340, Nogales, Arizona.

2. Respondent, Cumberland Produce Co., Inc., is a corporation whose address is P.O. Box 25025, Nashville, Tennessee. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about March 10, 1982, complainant sold and shipped to respondent 84 crates of extra large bell peppers, Tepeyac brand, at $19.90 per crate, plus $.50 per crate for palletization, or a total of $1,713.60, f.o.b.

4. The peppers left complainant's place of business in Nogales, Arizona, sometime after 4 p.m. on March 10, 1982, and arrived at respondent's place of business in Nashville, Tennessee, on March 15, 1982. After arrival the peppers were unloaded by respondent from the truck and placed in respondent's cooler.

5. On March 16, 1982, at 9 a.m. a federal inspection was made c the peppers which showed in relevant part as follows:

. . . Lot Inspection

WHERE INSPECTED: Applicant's cooler

Products Inspected: SWEET PEPPERS in wire bound crates labeled "Ritz, Bell Peppers, Grown in Mexico" and stamped "L", or labeled "Tepeyac Brand, Grown in Mexico" and stamped "XL, Bell Peppers, 30 Lbs. Net Wt.". Applicant states 116 crates.

Condition of Load: Stacked on pallets at above location.

Condition of pack: Each lot; Fairly tight. Place packed. Paper

red color. From 2 to 8% average 6% damage by shriveling. Average 2% decay. *Tepeyac brand lot:* Mostly fresh and firm and good green color. Decay ranges from 2 to 24%, average 12%, including 7% affecting stem only, remainder affecting walls and calyxes. Decay is Bacterial Soft Rot mostly in early, many in advanced stages.

6. Respondent resold the peppers on March 17, 1982, for gross proceeds of $420.00. Respondent deducted a freight charge in the amount of $2.50 per crate or $210, a handling charge of $.50 per crate or $42, a brokerage fee of $.15 per crate or $12.60, and the cost of the USDA inspection or $30. The total charges deducted by respondent were $294.60, for net proceeds of $125.40. Respondent waived any commission charge, but stated that such charge would normally be 15%. Respondent's payment to complainant, which included the $125.40, was returned by complainant to respondent.

7. The formal complaint was filed on May 24, 1982, which was within nine months after the cause of action alleged herein accrued.

CONCLUSIONS

Complainant seeks to recover the full purchase price of the peppers shipped on March 10, 1982. Respondent contends that the peppers arrived in poor condition and that consequently it should not be liable for the full price of the peppers.

The only issue in this proceeding is whether the 84 crates of peppers, which were the subject of the contract, made good delivery under the f.o.b. terms of sale. The regulations (7 CFR 46.43(i)) define f.o.b. as meaning:

> . . . that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . . and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed. . . .

The regulations further provide (7 CFR 46.43(j)) that:

> "Suitable shipping condition," in relation to direct shipments, means that the commodity, at time of [illegible] which, if [illegible]

Once the peppers were placed free on board the truck respondent became responsible for any deterioration in the peppers caused by abnormal transportation conditions or service. In addition, the suitable shipping condition warranty, applicable in f.o.b. sales, and quoted above, is expressly stated to be inapplicable where transportation services and conditions are not normal. Since respondent accepted the 84 crates of peppers by unloading them from the truck, it had the burden of proving that the warranty is applicable, i.e., in this case, the transportation services and conditions were normal. *Dave Walsh* v. *Rozak's* 39 Agric. Dec. 281 (1980) and *Valley Packing Co.* v. *Nicholas J. Zerillo, Inc.*, 28 Agric. Dec. 1352 (1969). The truck left complainant's place of business sometime after 4 p.m. on March 10, 1982, arrived in Nashville sometime on March 15, and was federally inspected on the morning of March 16, 1982. Thus the peppers were in transit for a period of five days, and were not inspected until the morning of the sixth day after shipment. Respondent introduced no evidence concerning normal transit time. The five day period appears on its face to be an excessive period of time for transportation by truck from Nogales, Arizona, to Nashville, Tennessee. We conclude that respondent has failed to prove that transportation services and conditions were normal and, therefore, the suitable shipping condition warranty does not apply to this shipment of peppers.

It should also be noted that even if the warranty were deemed applicable, there is no way of knowing from the Federal inspection at destination that the 12% average decay noted by such inspection was applicable to the entire 84 crates of Tepeyac brand peppers. The inspection was of two lots which were stated to total 116 crates, but nowhere does the inspection state how many of the Tepeyac brand peppers were inspected. It is obviously possible that such inspection covered only a small portion of the Tepeyac brand peppres, and would thus not be representative of the condition of the entire 84 crate lot. See *Mutual Vegetable Sales* v. *Select Distributors*, 38 Agric. Dec 1363 (1979) and *Maris Saikhon* v. *Russell-Ward Company, Inc.*, 34 Agric. Dec. 1940 (1975). Since respondent had the burden of proof in this regard, it must suffer the consequences of its failure to show how the goods were inspected.

Respondent accepted the peppers, and thus became liable to complainant for the full purchase [illegible]

has already paid complainant $45.60 of this amount, which leaves a balance still due and owing of $1,668. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $1,668, with interest thereon at the rate of 13% per annum from April 1, 1982, until paid.

Copies of this order shall be served upon the parties.

(No. 22,497)

SMISSON FARMS *v.* WILBUR L. BROWN, JR. d/b/a BARBER SALES. PACA Docket No. 2-6113. Decided April 11, 1983.

F.O.B. Sales—Acceptance-Contract price dispute—Breach of contract—Damages

Complainant sold 1,000 cartons of peaches to respondent who in turn sold them to another firm for delivery in three drops at three locations. The first two drops were received and accepted. The third drop was dumped two days after receipt The contract price dispute is resolved in favor of respondent as complainant failed to sustain its burden of proof. It is found that complainant breached its contract with respondent due to lack of proof of proper handling during the three day period from loading to actual date of shipment. Therefore, respondent suffered damages. Reparation awarded.

Edward M. Silverstein, Presiding Officer.

Complainant and respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $5,369.46 in connection with the shipment of one truckload of peaches in interstate commerce.

A copy of the Report

to complainant which check was released to the latter as an undisputed amount.

Since the amount claimed as damages does not exceed $15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR §47.20) was followed. Under this procedure, the verified pleadings of the parties are considered part of the evidence of the case as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements. Complainant filed an opening statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Smisson Farms, is a corporation whose mailing address is Box 668, Fort Valley, Georgia 31030.

2. Respondent, Wilbur L. Brown, Jr., is an individual doing business as Barber Sales, whose mailing address is Box 111, Hastings, Florida 32045. At all material times, respondent was licensed under the Act.

3. On June 10, 1981, at 2:15 p.m., at complainant's request a Federal inspection was begun on a load of peaches owned by it, consisting of 1000 cartons, and which it had loaded on a truck bearing Commonwealth of Virginia license plate number TRH 71-018. The inspection was completed at 6 p.m., on June 11, 1981. Inspection certificate No. D 151300 was issued after the inspection. That document reflects the following: During the course of the inspection the mechanical refrigeration unit was running; The peaches met the requirements of the appropriate Federal marketing order and showed a temperature range of 56°F to 60°F. In addition, the inspector noted the "Defects, Decay, Soft Rot Decay:" as "average within tolerances no decay" and the "Grade" as "U.S. Extra no. 1, 65% fancy color." After the inspection, the driver of the truck was instructed to take the peaches home and to call at 10 a.m. on the morning of Friday July 12, 1981, for delivery instructions. The truck manifest instructed that the temperature was to be maintained at "38 DEGREES TO DESTINATION." The load was sold to an unnamed buyer. For some unknown reason, complainant cancelled that sales agreement and sought another buyer.

4. On or about June 13, 1981, by oral contract, complainant sold

lows: 250 to Dublin Produce, Brooklyn, New York, 250 cartons to King Supermarkets, West Caldwell, New York, and 500 cartons to King Cullen, Jamaica, New York. The Dublin Produce and Key Foods shipments were dropped off first and were accepted. Upon arrival at King Cullen on June 16, 1981, a federal inspection was conducted of 499 cartons and an Abridged Inspection Certificate, No. B 10894, was issued. It is reflected there that the peaches showed temperatures of 43-44 degrees, and that the peaches failed to grade U.S. No. 1. The condition of the peaches is noted as follows:

> Mostly firm, many firm ripe. Mostly yellow, some greenish yellow ground color. Average 3% damage by bruising 3 to 65% in most samples, none in some average 17% Blue Mold rot and Brown Rot in various stages.

Upon learning of this inspection, complainant requested another inspection. Although the certificate from this second inspection was not made part of the record, it is noted in the record that the result of that inspection was a finding of 2-70%, average 24%, Blue Mold rot. King Cullen rejected the peaches and they were moved to the Hunts Point Tomato Co., Inc., Hunts Point, New York, at a cost of $300.00. On June 18, 1981, the 499 cartons of peaches were dumped at a cost of $269.46, after a federal inspection which found their condition as:

> MOSTLY FIRM RIPE FEW FIRM AVERAGE 5% [illegible]. TURNING YELLOW TO YELLOW. 10 t [sic] 22% IN MOST SAMPLES NONE IN MANY AVERAGE 12% DAMAGE BY BRUISING SCATTERED THROUGHOUT PACK AND AFFECTING FIRM RIPE FRUIT. DECAY RANGES 12 TO 100% AVERAGE 44%, RHIZAPUS [sic] ROT AND BROWN ROT IN VARIOUS STAGES. [Abridged Inspection Certificate No. B 10673].

5. On August 28, 1981, John H. Hollingsworth who negotiated the sale on behalf of complainant, sent respondent a letter containing, in pertinent part, the following comments:

* * * * *

do not know, but I do know that the inspector rejected them at Long island and you were to handle them after that. * * *

J. T., we are due payment in full on the first 500 peaches taken off this truck. We also paid Joe Land Co. freight on entire load which you deducted. * * * We still need the inspections, including temperatures, and would like an explanation if at all possible, on why the sudden breakdown of these last 500 peaches as we know we shipped a good load and so does Rich and Roland.

* * * * *

6. In a letter dated April 9, 1982, John H. Hollingsworth sent the Department a letter in which he made the following comments:

* * * * *

This load was sold, at $5.50 F.O.B. plus $1.75 freight, but the market was weak and seemed to settle a day later at $5.00 FOB. We paid the freight on this load to Joe Land Co., who was our trucker.

This load was originally booked to another buyer, but changed because of the destination he was going to before loading was completed. At this time peaches were in very short supply with good demand.

* * * * *

These peaches were delivered at all three destinations, unloaded from truck [sic] and signed for without a complaint. Later we were advised that King Cullen Stores secured a USDA inspection showing 3% bruising and 3-65% average 17% blue mold rot in advanced stages. I could not believe this, so I called for a repeat inspection which showed 2-70% average 24% blue mold rot. All this time we were not advised that the peaches were not still on our truck. Barber was requested to go ahead and handle as he advised he had someone that would do a good job. * * *

7. Including the $850.00 paid as an undisputed amount, respon-

CONCLUSION

This case involves 1000 cartons of peaches shipped from Georgia to New York. 499 cartons of the peaches were dumped two days after receipt, 500 cartons were sold, and there is no evidence as to what was done with the remaining carton. Since, as noted above, it admits having accepted at least some of them and a receiver cannot reject a portion of a commercial unit. We conclude that the 1000 cartons were received and accepted by respondent. *H. Hall & Co. v. Consolidated Produce Co.*, 41 Agric. Dec. 1429 (1982).

That respondent's customer may have had the right to reject the portion of the 1000 cartons sold to it because that portion was a commercial unit as to that customer is not material in this consideration. Thus, since respondent must be deemed to have accepted at least the portion of the load dropped off at its first two customers, it must also be deemed to have accepted the remaining portion of the load although that portion was rejected by respondent's customer. 7 CFR 46.43(ii)); *Salinas Lettuce Farmers Co-op. v. Larry Ober Co.*, 39 Agric. Dec. 65 (1980).

Having been deemed to have accepted the 1000 cartons, respondent is obligated to complainant for the full contract price less payments already made and damages resulting from a breach of contract by complainant. Respondent has the burden of proof as to complainant's breach and any damages suffered by it. *A.W. Anderson & Son v. Ft. Lauderdale Produce*, 39 Agric. Dec. 60 (1980). There is some dispute as to what the contract price was. On this point, complainant has the burden of proof. *New York v. Pier*, 32 Agric. Dec. 702 (1973). Complainant alleges that the [illegible] was $5.50 f.o.b. plus $1.75 shipping; respondent that it was [illegible] f.o.b. plus $1.75 shipping. Complainant has failed to sustain [illegible] burden of proof on this point. Based on the April 9, 1982, [illegible]-worth letter, referred to in paragraph 6 of the Findings of [illegible] as well as documents submitted by respondent on which the [illegible] were memorialized by his employees at about the same [illegible] contract was entered into between the parties, which [illegible] in Findings of Fact paragraph 4, we find that the price [illegible] $1 [illegible] plus $1.75 shipping, or a total of $6,650.00.

[illegible]-respondent claims damages of $3,894.46 on the shipment, or the [illegible] price of 500 of the cartons plus $300 extra freight, plus [illegible] for dumping charges. The basis for its [illegible] of peaches had [illegible]

proof, that the peaches were mishandled. However, it also offers no proof of proper handling during the three-day period of time when it controlled the peaches, June 10-13, 1981. Since we do not know what happened to the peaches during this three-day period of time, or where they traveled and under what conditions, and what the condition of the peaches was on the thirteenth, we cannot find that the peaches sold to respondent were damaged after respondent purchased them and while respondent had dominion and control over them. We, therefore, find that complainant breached its contract with respondent and that respondent has suffered damages in the amount of $3,887.81. This represents the contract price for the 499 cartons of peaches dumped plus $300 freight and $269.46 for dumping charges. * The contract price for this load was $6,650.00, and respondent's damages amounted to $3,887.81. Therefore, respondent's obligation to complainant on this load was $2,762.19. As respondent has paid complainant $2,755.54, it is still obligated to complainant in the amount of $6.65. We find that respondent's failure to pay complainant $6.65 is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within 30 days of the date of this Order, respondent shall pay complainant, as reparation, $6.65, with interest thereon at the rate of 13% per annum from July 1, 1981, until paid.

Copies of this Order shall be served on the parties.

(No. 22,498)

BOB PRICE AND ASSOCIATES, INC. *v.* CALAVO GROWERS OF CALIFORNIA. PACA Docket No. 2-5765. Decided April 21, 1983.

F.O.B. Sale—Contract price—Suitable shipping condition warranty—Reparation awarded

Complainant sold two shipments of Kiwi fruit to respondent F.O.B. consisting of 300 trays in the first shipment and 774 in the second shipment. Both shipments were received by respondent at its warehouse and unloaded and loaded again onto another truck for shipment to its customers which action constitutes ac-

of the evidence that the fruit was sold at the price claimed by complainant. Reparation is awarded to complainant.

George S. Whitten, Presiding Officer
Complainant and respondent, *pro se*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of $7,518.00 in connection with two shipments of Kiwi fruit in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint (filed February 10, 1981) was served upon respondent, which filed (March 27, 1981) an answer thereto denying libility to complainant. Since the amount claimed in the formal complaint exceeds $3,000.00 (Pub.L. 97-98-December 22, 1981, changed this amount to $15,000) and respondent requested an oral hearing, a hearing was held in Los Angeles, California on July 15, 1982. Two witnesses testified on behalf of complainant, and one testified on behalf of respondent. The depositions of two additional witness were received in evidence at the hearing. Both parties filed a brief.

FINDINGS OF FACT

1. Complainant, Bob Price & Associates, Inc., is a corporation whose address is P.O. Box 219, Vista, California.

2. Respondent, Calavo Growers of California, is a corporation whose address is P.O. Box 3486, Terminal Annex, Los Angeles, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about November 30, 1979, complainant sold to respondent 300 trays of sized 42 Kiwi fruit at $7.00 per tray f.o.b. with the stipulation that if respondent's cost of transportation of the Kiwi fruit to Eastern markets was less than 75¢ per tray, complainant would receive an additional payment in the amount of the difference between the actual

spondent were palletized. However, respondent unloaded the Kiwi fruit at its Escondido packing house, and reshipped the fruit to its Eastern markets without palletization.

5. The 300 trays of Kiwi fruit arrived at the place of business of respondent's customer in Chelsea, Massachusetts on December 8, 1979, and were federally inspected on December 10, 1979, at 7:10 a.m. with the following results in relevant part:

WHERE INSPECTED: Applicant's Whse

Products Inspected: KIWI FRUIT in cartons branded, "California Kiwi." Cartons stamped, "42 Hayward Variety." Applicant states: 300 cartons.

Condition of Load: Stacked on pallets at above location.

Condition of Pack: Tight in trays.

Temperature of Product: 40°F.

Condition: Mostly firm, some firm ripe. Damage by bruising average 5%. From 5 to 14%, average 9% crushed and broken fruit. From 5 to 12%, average 10% soft fruit.

Remarks: Applicant states above shipment identified as 0 9 MEM. 0 0 1.

Respondent reported the results of the federal inspection to complainant on December 13, 1979.

6. On or about December 7, 1979, complainant sold to respondent 486 trays of size 42 Kiwi fruit and 288 trays of size 48 Kiwi fruit, at $7.00 per tray f.o.b. with the stipulation that if respondent's cost of transportation of the Kiwi fruit to Eastern markets was less than 75¢ per tray complainant would receive an additional payment in the amount of the difference between the actual cost of freight and the 75¢ per tray figure.

7. On or about December 7, 1979, complainant shipped from Vista, California, to respondent at respondent's packing house in Escondido, California, the 774 trays of Kiwi fruit covered by finding of fact 6. The 774 trays of Kiwi fruit shipped by complainant were palletized. However, respondent unloaded the Kiwi fruit at its

WHERE INSPECTED: Applicant's Whse.

Products Inspected: KIWI FRUIT in plastic trays packed in cartons branded "California Kiwi," Cartons stamped, "42 Hayward Variety." Applicant states: 200 cartons.

Condition of Load: Stacked on pallets at above location.

Condition of Pack: Tight in trays.

Temperature of Product: 50°F.

Condition: Mostly firm,some firm ripe. Damage by bruising average 5%. From 2 to 7%, average 5% crushed and broken fruit, from 5 to 19%, average 8% soft fruit. No decay.

Remarks: Applicant states above shipment identified as 09 MEM 0 0 4.

9. On December 14, 1979, at 1:05 p.m., 495 cartons of the Kiwi fruit covered by finding of fact 6 were subjected to Canadian inspection at the place of business of respondent's customer in Ville St-Laurent, P.Q., Canada with the following results in relevant part:

MARKS ON PGS.: Produce of U.S.A. King Salad Avocado Co. Inc. Vista, Ca. Also variety and count.

WHERE INSPECTED: In trailer and consignee's warehouse.

PRODUCTS OR DECLARED VARIETY: Kiwi Fruit *(Hayward)*

NO AND KIND OF PGKS. 495 Ctns.

SIZE OF PRODUCT: 42, 48.

TEMPERATURE:
PRODUCT (TOP): 6°; PRODUCT (BOTTOM): 8°; VEHICLE: 7; *OUTSIDE*: −1°; WAREHOUSE 10°

CONDITION OF VEHICLE,
LOAD, KGS AND PACK: Trailer clean. Only 2 stacks left in trailer when inspection started loaded 5 and 6 wide by [illegible]

slightly creased 5% soft. 35% flatened and partly cracked open. No decay in evidence.

IDENTIFICATION: Inspection requested for and certificate restriction to condition only.

8. An informal complaint was filed on August 28, 1980, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Complainant seeks to recover from respondent the full purchase price of the two shipments of Kiwi fruit, or $7,518.00. Complainant alleges that the terms of sale were as stated in findings of fact of 3 and 6, but acknowledges that it was aware at the time of the sale that the Kiwi fruit was to be shipped to Eastern markets. Respondent alleges in its answers to the complaint that there was no agreement for a purchase of the subject Kiwi fruit at a fixed price, but rather that the agreement was for "an open price purchase arrangement."

The record shows that the individuals who negotiated the contracts were Bob Price of complainant and Albert Bouvet of respondent. Although Albert Bouvet did not testify at the hearing, his deposition was placed in evidence, and Mr. Bouvet testified as follows as regards the contract which he entered with Mr. Price:

> ... AT THAT TIME, I CALLED MR. PRICE AND WE ARRIVED AT A $7 FOB—WHAT IS THAT—FALLBROOK, I GUESS. WHEREVER HIS DOCK IS LOCATED DOWN NEAR SAN DIEGO. AND THE TERMS OF THE SALE AS BEST I CAN RECALL IT—
>
> Q. PARDON ME. WHAT DO YOU MEAN WHEN YOU SAY YOU ARRIVED AT A $7 FOB?
>
> A. IN OTHER WORDS, WE WERE TALKING AT THAT TIME APPROXIMATELY—CALAVO TAKING A 10 PERCENT COMMISSION OFF THE $7 BILL WHICH WOULD HAVE BEEN—WELL, SO WE HAD TO SELL IT FOR $7.70. I MADE AN AGREEMENT WITH MR.

At another point in the deposition transcript Mr. Bouvet summarized his agreement as follows:

> ... WE ARRIVED AT A $7 BILL. YOU HAVE TO ARRIVE AT SOME FIGURE IN A FORMULA TO COME UP WITH A FORMULA. WE ADDED 50 CENTS PROFIT ONTO THAT, 75 CENTS FREIGHT. OUR PRICE DELIVERED TO THE CUSTOMER, THE LAST I CAN REMEMBER THE PRICE WAS EIGHT AND A QUARTER. THAT REDUCED BY 75 CENTS, THE TRANSPORTATION, 50 CENTS, THE PROFIT AND THE $7 NET BACK TO BOB PRICE AND ASSOCIATES.

Mr. Bouvet also stated at numerous places in the deposition that the contract was subject to acceptance by the customer on arrival depending upon the condition of the fruit on arrival. For example:

Q. WAS MR. PRICE VERY CLEAR IN HIS UNDERSTANDING WHEN YOU TALKED WITH HIM THAT THE FRUIT YOU WERE GOING TO SELL WAS GOING TO BE SOLD SUBJECT TO ITS CONDITIONS UPON ARRIVAL?

A. YES. TO SUBSTANTIATE THAT, THE FACT THAT THERE WAS NEVER AN INVOICE MAILED TO CALAVO GROWERS IN ANY FORM AT ALL. INVOICES FOR THAT FRUIT WERE NEVER SENT. IT CLEARLY SHOWS THAT IT WAS FINAL ACCEPTANCE ON ARRIVAL.

Q. I'M SORRY. COULD YOU EXPLAIN THAT? I'M NOT SURE WHAT YOU MEAN.

A. IN OTHER WORDS, WHEN YOU HAVE A SHIPMENT THAT IS NOT GOING TO BE FINALIZED OR THE ACTUAL TRANSACTION DOES NOT BECOME FINAL UNTIL THE CUSTOMER ACCEPTS THAT MERCHANDISE, YOUR SUPPLIER OR THE SELLER IN THIS CASE WILL NOT INVOICE YOU. YOU HAVE

The copies of invoices which were attached to the complaint show a date approximately five months after the transactions took place. Mr. Price explained the failure of his company to send invoices as being due to the uncertainty as regards the amount of the transportation charge. In this regard Mr. Price testified in his deposition as follows:

> The invoicing was not done because of the fact that Calavo had never come back or Al had never come back because we had never made an agreement on the freight rate. So we did not invoice it out because of the fact that Al was going to come back and tell us what—if they got anything off the truck at a lower figure as far as the freight rate rather than 75 cents. So I could not invoice until we found out whether it was going to be $7.00, $7.05 or $7.10.

Mr. Price testified numerous times that the fruit was sold at a minimum f.o.b. price of $7.00 per tray. In addition, he specifically denied complainant's allegation that the fruit was bought subject to its condition on arrival:

Q. What representations did Al make to you that made you believe that in fact you were going to get a minimum of seven dollars?

A. Exactly that. We talked and he agreed, in other words to work for 50 cents. He told me what he had sold them for, and wanted more money. He had wanted ten percent as a condition, and we made an agreement on a basis of 50 cents, based on the sale price of 8.25; plus the fact that if the freight was less than 75 cents, that he would pay that to us.

Q. Did Al ever tell you that he was buying the fruit subject to its condition on arrival?

A. No. Nope. In no way, shape or form, because we would never have sold it under that basis, because we had no idea of what it was going for or where it was going . . .

We conclude from all of the evidence [illegible]

truck, and transferred it to another truck for shipment to its customers. This action by respondent amounted to an act of acceptance of the Kiwi fruit. See *Lindemann Farms* v. *Food Fair Stores*, 36 A.D. 92 (1977); and *Crown Orchard Co.* v. *Mid-Valley Prod. Corp.*, 34 A.D. 1381 (1975). Since respondent accepted the fruit it became liable to complainant for the full purchase price thereof less any damages resulting from any breach of contract on the part of complainant. Respondent alleges as an affirmative defense to the complaint that complainant breached the contract of sale by failing to provide Kiwi fruit in suitable shipping condition and in suitable shipping containers, which resulted in "the transit damage sustained by Complainant's Kiwi fruit. . . ." As to the allegation that the fruit was not in suitable shipping condition, we note that the only condition defect disclosed by the inspection reports at destination, other than the crushing and bruising, was soft fruit ranging from an average of 2% to an average of 10%. However, the record in this proceeding makes it very clear that respondent's Al Bouvet inspected the fruit on the first load prior to its shipment, and had explicit knowledge of the softness in the fruit. The record indicates that respondent expected the second load to be similar to the first. We conclude that respondent has failed to prove any breach of the suitable shipping condition warranty.[1]

Respondent also claims that complainant breached the contract of sale by shipping fruit in inadequate cartons, and that as a result the crushing in the fruit shown by the inspections at destination occurred. There are several problems with this contention. First is the fact that respondent's represenative, Al Bouvet, inspected the fruit in the cartons prior to its shipment, and thus must be deemed to have approved of such cartons. Second, is the fact that the cartons were palletized by complainant when they were shipped to respondent in such a manner as to prevent their shifting, and thus prevent any crushing from taking place. Respondent's breaking of the palletization at its facility in Escondido, and subsequent reshipment of the fruit in an unpalletized condition may well have been

1. Although the record indicates that complainant, at the time of entering the contract contemplated that the suitable shipping condition
market de-

the reason why some of the fruit arrived at destination in crushed condition. We conclude that respondent has failed to prove this defense.

Since respondent accepted the fruit, and has failed to prove any breach of contract on the part of complainant, respondent is liable to complainant for the full purchase price of such fruit, or $7,518.00. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides that "the Secretary shall order any commission merchant, dealer, or broker who is the losing party to pay the prevailing party, as reparation or additional reparation, reasonable fees and expenses incurred in connection with any [oral] hearing." Complainant filed a claim for expenses in the amount of $78.00, which we deem to be reasonable, and to have been incurred in connection with the oral hearing. Complainant should be awarded additional reparation in this amount.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $7,518.00, with interest thereon at the rate of 13 per cent per annum, from January 1, 1980, until paid.

Within thirty days from the date of this order, respondent shall pay to complainant, as additional reparation, $78.00, with interest thereon at the rate of 13 per cent per annum, from the date of this order until paid.

Copies of this order shall be served upon the parties.

(No. 22,499)

RUSHTON & CO., INC. v. Evergood Enterprises. PACA Docket No. 2–5847. Decided April 21, 1983.

Material breach of contract—Acceptance—Failure to prove damages—Reparation awarded

Complainant sold and shipped ten container loads of oranges to respondent at dock

George S. Whitten, Presiding Officer.
Complainant, *pro se*.
Paul L. Hong, San Francisco, California, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $24,382.22 in connection with the shipment of 10 container loads of oranges in foreign commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties, and respondent was served with a copy of the complaint. Respondent filed an answer to the complaint denying any liability thereunder.

Complainant requested an oral hearing, and such hearing was held on July 13, 1982, in San Francisco, California. Three witnesses testified for complainant, and one witness testified on behalf of respondent.

FINDINGS OF FACT

1. Complainant, Rushton & Co., Inc., is a corporation whose address is 1900 Powell Street, Suite 330, Emeryville, California.

2. Respondent, Evergood Enterprises, is a partnership composed of Yin Chor Ng and Danny S. Yan, whose address is 205 Michelle Court, South San Francisco, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about April 1, 1980, in contemplation of subsequent movement in foreign commerce, complainant sold and shipped from Piru, California, to respondent at the Los Angeles, California docks, one container load, comprised of 1,000 cartons of Fancy Airship brand navel oranges of various sizes, for a total price of $6,227.50. The contract terms were "delivered to dock, Los angeles." The container load of oranges had been previously federal inspected March 31, 1980, and graded U.S. No. 1 Standard Pack with no decay, and noted to meet U.S. [illegible]
contai-

4. On or about April 2, 1980, in contemplation of subsequent movement in foreign commerce, complainant sold and shipped from Piru, California, to respondent at the Los Angeles, California docks, one container load, comprised of 1,000 cartons of Fancy Airship brand navel oranges, of various sizes, for a total price of $6,175.00. The contract terms were "delivered to dock, Los Angeles." The container load of oranges had been previously federally inspected April 1, 1980, and graded U.S. No. 1 Standard Pack with no decay, and noted to meet U.S. standards for export. The container was subsequently shipped on or about April 3, 1980, aboard the vessel "Trade", by respondent to its customers in Hong Kong.

5. On or about April 4, 1980, in contemplation of subsequent movement in foreign commerce, complainant sold and shipped from Piru, California to respondent at the Los Angeles, California docks, one container load, comprised of 1,000 cartons of Fancy Airship brand navel oranges, of various sizes, for a total price of $6,175.00. The contract terms were "delivered to dock, Los angeles." The container load of oranges was federally inspected April 4, 1980, and graded U.S. No. 1 Standard Pack with no decay, and noted to meet U.S. standards for export. The container was subsequently shipped on or about April 6, 1980, aboard the vessel "S.L. Patriot", by respondent to it customers in Hong Kong.

6. On or about April 4, 1980, in contemplation of subsequent movement in foreign commerce, complainant sold and shipped from Piru, California to respondent at the Los Angeles, California docks, one container load, comprised of 1,000 cartons of Fancy Air Ship brand navel oranges, of various sizes, for a total price of $6,175.00. The contract terms were "delivered to dock, Los Angeles." The container load of oranges was federally inspected April 4, 1980, and graded U.S. No. 1 Standard Pack with no decay, and noted to meet U.S. standards for export. The container was subsequently shipped on or about April 6, 1980, aboard the vessel "S.L. Patriot", by respondent to its cutomers in Hong Kong.

7. On or about April 7, 1980,in contemplation of subsequent movement in foreign commerce, complainant sold and shipped from Piru, California to respondent at the Los Angeles, California docks, one container load, comprised of 1,000 cartons of Fancy Airship brand navel oranges, of various sizes, for a total price of $5,881.00.

8. On or about April 7, 1980, in contemplation of subsequent movement in foreign commerce, complainant sold and shipped from Piru, California to respondent at the Los Angeles, California docks, one container load, comprised of 990 cartons of Fancy Airship brand navel oranges, of various sizes, for a total price of $5,929.00. The contract terms were "delivered to dock, Los Angeles." The container load of oranges was federally inspected April 7, 1980, and graded U.S. No. 1 Standard Pack with no decay, and noted to meet U.S. standards for export. The container was subsequently shipped on or about April 8, 1980, aboard the vessel "Tyler", by respondent to its customers in Hong Kong.

9. On or about April 8, 1980, in contemplation of subsequent movement in foreign commerce, complainant sold and shipped from Piru, California to respondent at the Los Angeles, California docks, one container load, comprised of 1,000 cartons of Fancy Airship brand navel oranges, of various sizes, for a total price of $5,918.50. The contract terms were "delivered to dock, Los Angeles." The container load of oranges was federally inspected April 8, 1980, and graded U.S. No. 1 Standard Pack with no decay, and noted to meet U.S. standards for export. The container was subsequently shipped on or about April 10, 1980, aboard the vessel "S.L. Finance", by respondent to its customers in Hong Kong.

10. On or about April 11, 1980, in contemplation of subsequent movement in foreign commerce, complainant sold and shipped from Piru, California to respondent at the Los Angeles, California docks, one container load, comprised of 1,000 cartons of Fancy Airship brand navel oranges, of various sizes, for a total price of $5,927.00. The contract terms were "delivered to dock, Los Angeles." The container load of oranges had been previously federally inspected April 10, 1980, and graded U.S. No. 1 Standard Pack with no decay, and noted to meet U.S. standards for export. The container was subsequently shipped on or about April 11, 1980, aboard the vessel "Lexington", by respondent to its customers in Hong Kong.

11. Two container loads of Mansion Brand navel oranges were sold and shipped in the latter part of March 1980 by complainant to respondent. The invoice prices on these two loads were $7,031.25 and $6,050.00 respectively. The parties agree that respondent has made payment in the amount of $6,631.25 on the first of these loads leaving a balance still due of $400.00 and that a balance is due on the second of these loads of $6,150.00.

12. It was understood between the parties as a part of their contract, that all of the oranges sold were to be from the southern district of California. However, upon arrival of the oranges covered by findings of fact 3–10 in Hong Kong, respondent's customers complained by telephone that the oranges were from the central district of California rather than the southern district. This complaint was promptly conveyed to complainant. Respondent received the following two letters from its receivers in Hong Kong stating in relevant part as follows:

. . .

Hong Kong
June 27, 1980

Dear Sirs,

re: Sunkist navel Oranges—1000 cts shipped per ss *"Trade"* B/L No. 995–806852 dated April 9, 1980. 1,000 cts shipped per ss "SEATRAIN PRINCETON" B/L No. 40–17778–2 dated April 16, 1980.

We regret to inform you that the quality of the consigned above 2 "AIRSHIP" Navels was very poor—notably the fruits became softened and the rind was found brown rotten due to long-term storage, as we believed. At the same time, to the best of our knowledge, those oranged (sic) are the product of the Central of California and the unit price per carton should be cheaper. The average selling price about HK$32.00 per carton. We suffered a big loss.

In view of the above, these oranges lowered the quality of your offer, therefore it is your responsibility to settle this matter.

Please claim the Packer against the alleged damage for 30%–35% of the total value.

. . .

Your sincerely,
E. VANSON TRADING COMPANY

Hong Kong, Aug. 6, 1980

Gentlemen

With reference to our long distance conversation 2 days ago regarding our claim of the above captioned shipments, we regret to reply you that your offer for compensation of U.S. $6,000.00 for our losses on all shipments is unacceptable to us.

We must have to point out to you that the oranges that you shipped to us under the above Bills of Lading are central oranges that are entirely not the right merchandises we offered. You clearly accepted and confirmed to our orders of *southern* navels.

Due to these wrong merchandises that caused us loosing (sic) big money about 35% of your invoice value plus other handling expenses and our commission totally about 42% of your invoices. We are now just having a claim on you for total loss of 30%.

. . .

Yours very truly,
Wider Trading Company

13. Respondent has made payments to complainant totalling $35,617.03.

14. As to the two container loads shipped aboard the S.L. Patriot and covered by findings of fact 5 and 6, one container load contained 868 cartons of Southern California fruit out of the total of 1,000 cartons and the other container load contained 818 cartons of Southern California fruit out of the 1,000 cartons. As to the container shipped aboard the vessel Trade and covered by finding of fact 4, 809 cartons of fruit were from Southern California and 191 from Central California. As to the other six container loads, as reflected in findings of fact 3, 7, 8, 9, 10 and 11, all the oranges came from central California.

15. Complainant filed two informal complaints, one on October 14, and one on October 30, 1980. These dates were within 9 months after the causes of action herein accrued.

CONCLUSIONS

Complainant seeks to recover the full invoice price of the subject oranges after deduction of an unrelated credit allowed respondent and the total of respondent's payments to complainant. Respondent interposes as its defense to complainant's action [illegible] complainant breach[illegible]

The evidence discloses that the terms of the sale were "delivered to dock in Los Angeles", and that respondent accepted the subject oranges at dock side in Los Angeles. It is clear, then, that the f.o.b. suitable shipping condition rule is not applicable to this proceeding and that respndent is liable for any deterioration in condition of the oranges which took place during transit. However, the breach alleged by respondent is not a breach as to condition, but rather a material breach of contract due to failure of complainant to supply respondent with the correct type of oranges. Respondent claimed initially that all of the oranges were derived from central California rather than southern California. Later this claim was dropped as to the oranges covered by finding of fact 11. Complainant, after receiving respondent's protest with regard to the origin of the oranges checked with its supplier, and reported back to respondent that respondent's customers were correct in alleging that the oranges covered by findings of fact 3–10 were from central California rather than southern California. However, after complainant checked more closely with its supplier, at a later date, it found documentary evidence that the containers covered by findings of fact 4, 5 and 6 contained predominantly southern California oranges (See finding of fact 14). Complainant introduced this documentary evidence at the hearing along with testimony by an employee of its supplier explaining such evidence. Respondent did not seek to rebut such evidence, and we have concluded that the oranges covered by findings of fact 4, 5 and 6 were predominantly southern California oranges as stated in finding of fact 14.

Respondent also submitted testimonial evidence, which was supported by testimony of complainant's witnesses, to the effect that there is a noticeable difference between navel oranges from southern California and those from central California. Respondent also contended that southern California oranges are greatly preferred in the Hong Kong market to which these oranges were destined, and that such oranges bring a significantly higher price in such market.

It is, of course, without question, that complainant committed a material breach of the contract by shipping all central California oranges in six of the containers and part central California oranges in three of the containers. However, since respondent accepted the oranges at dock side in Los Angeles, it is liable to complainant for the full contract price less damages resulting from the material

There are, however, a number of problems with the evidence submitted by respondent in an effort to prove its damages. These problems preclude us from making an award of damages in respondent's favor. First, respondent's evidence as to value as to southern California oranges in Hong Kong consisted of a recap under its own letter head showing the resale of only 270 cartons of "Homer brand" southern California navel oranges on April 29, 1980. Respondent did not submit the accounting from the merchant in Hong Kong covering the sale of the Homer brand southern California oranges. Also, the resale of two of the subject containers of oranges took place on May 10 and May 12, 1980, and we have no way of knowing that the price of southern California oranges remained stable in Hong Kong over the intervening period of time. In any event, there are two much more serious problems with respondent's proof of damages: first, relative to the two container loads covered by findings of fact 3 and 7 which were the subject of the letter to respondent from E. Vanson Trading Company, it is obvious that such letter constitutes an admission that the oranges which were the subject of such letter were in a deteriorated condition at the time of the resale in Hong Kong. Since respondent would be responsible under the terms of the contract for such poor condition, the resale of such oranges in Hong Kong cannot be used as a basis for computing the damages resulting from complainant's material breach which involved not condition defects, but the type of orange. The second problem brings into question the whole of respondent's data by which it seeks to prove damages. As we have stated before the oranges covered by findings of fact 4, 5 and 6 were predominantly southern California oranges. However, the data submitted by respondent covering the resale in Hong Kong of the eight container loads covered by findings of fact 3–10 shows that all of the oranges sold for approximately the same price. Respondent's breakdown of the resales shows four to five lots of oranges sold from each container load, such lots ranging in size from 50 to 300 cartons, and the prices for each lot ranging only from 32.60 to 35.00 Hong Kong dollars. To state the problem more plainly the preponderance of respondent's evidence shows that there was no difference in difference in price realized by its receivers between the southern and central California oranges. We find that respondent has failed to prove any damages resulting from complainant's breach.

The total invoice amount for the 10 container loads of [illegible] sold by complainant [illegible]

balance still due and owing from respondent to complainant of $24,382.22. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Complainant is the prevailing party. However, complainant did not file a claim for fees and expenses, and therefore none can be awarded.

ORDER

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $24,382.22, with interest thereon at the rate of 13% per annum from May 1, 1980, until paid.

Copies of this order shall be served upon the parties.

(No. 22,500)

SWANEE BEE ACRES, INC. *v.* GRO-PRO, INC., and/or FRUIT HILL, INC. PACA Docket No. 2-6070. Decided April 21, 1983.

Contract price, deductions from—Reparation awarded

Complainant contracted to sell to and delivered to respondents its 1981 harvest of red tart cherries. Respondents partially paid complainant but made deductions for a "freight equalization" and a lower grade score. Nothing in the record indicates there was an agreement for a "freight equalization" deduction. Weight and grade receipts which complainant received from respondents indicate that the cherries were within the usual grade range for the contract price. Reparation is awarded to complainant. Due to a special agreement between the parties a higher rate of interest is awarded.

George S. Whitten, Presiding Officer.
Complainant and respondent, *pro se*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A

dents. A copy of the report of investigation was also served upon complainant. Respondent Gro-Pro, Inc. filed an answer to the complaint denying liability to complainant. Respondent Fruit Hill, Inc., failed to file an answer.

The amount involved in this proceeding is less than $15,000.00 and therefore the shortened method of procedure set forth in section 47.20 of the Rules of Practice is applicable. Under such procedure the verified complaint and answer are considered a part of the evidence along with the Department's report of investigation. In addition the parties were given the opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Respondent did not file an answering statement. None of the parties filed briefs.

FINDINGS OF FACT

1. Complainant, Swanee Bee Acres, Inc., is a corporation whose address is P.O. Box 81, Ellison Bay, Wisconsin.

2. Respondent, Gro-Pro, Inc., is a corporation whose address is Old Pipestone Road, Eau Claire, Michigan. At the time of the transaction involved herein this respondent was licensed under the Act.

3. Respondent, Fruit Hill, Inc., is a corporation whose address is Old Pipestone Road, Eau Claire, Michigan. At the time of the transaction involved herein this respondent was licensed under the Act.

4. On or about July 17, 1981, complainant contracted to sell to respondents its 1981 harvest of red tart cherries at the agreed price of 47 cents per pound delivered to the Larson Orchard facility in Ellison Bay, Wisconsin.

5. From on or about August 4, 1981, through August 8, 1981, complainant delivered to respondents at the Larson Orchard facility, in Ellison Bay, Wisconsin, 285,093 pounds of red tart cherries graded 92% to 97%. Respondents packed the cherries in cans and shipped them to Michigan for storage and ultimate sale.

6. Respondents have paid complainant $121,821.30, leaving a balance due to complainant of $12,172.41.

7. The formal complaint was filed on March 29, 1982, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

July 17, 1981, under the letterhead of Fruit Hill, Inc., which is signed by Robert B. Crows as vice president of Fruit Hill, Inc. This letter made the basic contractual proposition to complainant for the purchase of cherries at 47 cents per pound. Such letter states in relevant part as follows:

> As to payment for the fruit, I will be competitive as to price and terms. Advances will be available on a limited basis particularly to custom shakers. At the present date, the cherry price is 47¢ per pound plant. The terms are generally within 30 days. My terms are 30 days.
>
> Please acknowledge my letter to you reference your intention to bring your crop to this plant.

The answer filed by Gro-Pro, Inc. is also signed by Robert Crows and includes as the first exhibit to such answer an identical copy of the letter quoted above with the Fruit Hill, Inc. letterhead. The letterheads used by Fruit Hill, Inc. and Gro-Pro, Inc. show the same address and telephone number for both corporations. We conclude that, in view of these considerations, and also due to Fruit Hill, Inc.'s default, such respondent is liable to complainant for the $12,172.41 claimed in the complaint. Respondent Fruit Hill, Inc.'s, failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest. In view of the fact that Fruit Hill, Inc. was acting interchangeably with Gro-Pro, Inc. relative to the whole contractual relationship with complainant we will award, against Fruit Hill, Inc., the same special rate of interest which we have awarded against Gro-Pro, Inc. (See the penultimate paragraph of this opinion.)

Respondent Gro-Pro, Inc.'s answer contains an unqualified admission to paragraph 7 of the complaint. Paragraph 7 of the complaint states as follows:

> 7. That respondent has paid to complainant $121,821.30 of the $133,993.71 due September 8, 1981 per attached exhibit #3, and that there is now due complainant from respondent GRO-PRO, INC. and/or FRUIT HILL, INC. jointly or severally $12,172.41, plus interest, no part of which has been paid. The letter from GRO-PRO, INC., dated September 22, 1981, indicating interest due, is attached marked exhibit #4.

Wisconsin was pegged at 47 cents "less 2¢ per pound for freight equalization." There is nothing in the record other than this statement by respondent Gro-Pro, Inc. to indicate that there was any agreement for any such "freight equalization." We conclude that respondent had no right to deduct this amount. In addition respondent states that there was a further reason for other deductions which it made in paying complainant:

> After the pack in Wisconsin the quality of the fruit was so poor that a grading system had to implemented. The cherries were scored from major and minor defects only due to time and plant flow considerations. Then 5% of minor defects was returned to growers score because Gro-Pro Inc. personnel felt that much could be removed in production. For example, if a grower scored 10% major defects and 10% minor defects, the grower would score 85% (100−10−10+5). Payment on same was then computed at 47¢−2¢ freight, times the recorded grade. At the time many growers observed this grading, many graded their own fruit, including the complainant and/or his agent, and were satisfied. . . .

Respondent's contention quoted above, as to the poor quality of the cherries, is reubutted by the copies of weight and grade receipts which complainant received from respondents when the cherries were delivered to the plant. Such receipts show the weight claimed by complainant and also show no grade below 92%. Complainant also attached to the complaint a copy of the Red Tart cherry Newsletter for July 8, 1981, which states that "Several processors have announced that they are in agreement with the 47¢ base price at 92 grade score. It appears that the 47¢ price will be for cherries grading 92-100." This indicates to us that the cherries received by respondents were within the usual grade range for the 47 cent price. We conclude that respondent Gro-Pro, Inc. is liable to complainant for the full 47 cent per pound price, or a balance of $12,172.41.

Complainant also claims that interest is due from respondents at the rate of 18 per cent per annum. In support of this claim complainant included as an exhibit to the complaint a copy of a letter dated September 22, 1981, from Robert B. Crows which states in relevant part as follows:

Although we normally award interest at the rate of 13 per cent per annum, in this case we find that there was a special agreement between the parties for interest at the rate of 18 per cent per annum from September 8, 1981, and we will therefore award interest at such rate.

Respondents, Gro-Pro, Inc. and Fruit Hill, Inc., failure to pay complainant the balance of $12,172.41, with the agreed 18 per cent interest, is a violation of section 2 of the Act for which reparation should be awarded to complainant.

ORDER

Within thirty days from the date of this order, respondents Gro-Pro, Inc. and Fruit Hill, Inc., shall pay to complainant, jointly and severally, as reparation, $12,172.41, with interest thereon at the rate of 18 per cent per annum from September 8, 1981, until paid.

Copies of this order shall be served upon the parties.

(No. 22,501)

COOK SALES COMPANY *v.* ROMNEY PRODUCE CO. PACA Docket No. 2–6114. Decided April 21, 1983.

Contractual relationship—Dismissal

Complainant shipped five loads of cabbage to Mr. Danilson and during the same period Mr. Danilson shipped to and respondent took delivery of seven loads of cabbage. On the basis of all the evidence in the record complainant has failed to prove that a contractual relationship existed between it and respondent Therefore, the complaint is dismissed.

Edward M. Silverstein, Presiding Officer.
Thomas R Olivert, Newport Beach, California, for complainant.
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

formal complaint, and filed an answer thereto denying any liability to complainant.

Since the amount claimed as damages does not exceed $15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR §47.20) was followed. Under this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements. Neither party filed a timely statement, however, complainant did file a brief.

FINDINGS OF FACT

1. Complainant is a partnership, composed of Charles Blevins, Nolan Cook, and John Davis, doing business as Cook Sales Company, whose mailing address is 15607 North 20th Street, Phoenix, Arizona 85022.

2. Respondent, Romney Produce Company, is a corporation whose mailing address is 601 East Jackson, Phoenix, Arizona 85004. At all pertinent times, respondent was licensed under the Act.

3. On or about August 20, 1981, September 3, 16, and 26, 1981, and October 8, 1981, complainant shipped five loads of cabbage to Mr. William J. Danilson, a/k/a Dan Danilson, d/b/a Happy Dan's Produce, and also d/b/a Prima Fruit Company, hereinafter sometimes referred to as "Mr. Danilson", 3150 East Washington Street, Phoenix, Arizona 85034, as follows:

Cook Sales File#	Date Shipped	Qty	Unit Price	Total Amount
439	8/20/81	200	$ 4.50	$ 900.00
498a	9/03/81	200	$ 4.75	$ 950.00
591	9/16/81	200	$ 4.75	$ 950.00
		100	$ 4.75	$ 475.00
630F	9/26/81	200	$ 4.50	$ 900.00
648B	10/08/81	200	$ 4.75	$ 950.00

As more fully set forth in finding of fact 5, below, Mr. Danilson shipped cabbage during this same period to respondent. However,

these invoices, respondent asked Mr. Danilson about them, and was told to ignore them, and that Mr. Danilson had already been billed by complainant for these loads. Mr. Danilson also told respondent that he was the seller to it, and would bill it for all shipments.

4. Further, as to each of the aforenoted shipments, complainant prepared a bill of lading indicating that the "consignee" was "Prima Fruit Co." On four of these bills of lading, it was indicated that the load was to be delivered to the "corner of Washington & 32nd St.," which was Mr. Danilson's address. In the fifth instance, the bill of lading indicated that parts of the load were to be delivered to five different location—one of which was respondent's place of business.

5. On or about August 21 and 27, 1981, September 3, 18, 28 and 30, 1981, and on or about October 9, 1981, respondent took delivery of 7 loads of cabbage from Mr. Danilson, as follows:

Primer Fruit Inv. #	Romney Purchase Order	Date	Qty	Unit Price	Total	Date Paid
770	21954	8/21/81	250	$ 4.50	$ 1125.00	8/28/81
1711	21991	8/27/81	151	4.50	679.50	8/28/81
796	22070	9/04/81	200	4.75	950.00	9/14/81
874	22263	9/18/81	200	4.75	950.00	10/16/81
656	22365	9/28/81	100	4.75	475.00	10/16/81
668	22397	9/30/81	200	4.50	900.00	10/16/81
674	23447	10/09/81	200	4.75	950.00	10/16/81

Respondent paid Mr. Danilson on October 16, 1981 in the amount of $3,428.34, and included payment for 2 shipments of pumpkins besides those involving the cabbages at issue here. On Prima Fruit invoice nos. 796, 874, 656, 668 and 674 the following was written "del for Cook Sales Co."

6. In its payments to Mr. Danilson, listed paragraph 5 above, respondent deducted 25 cents per carton from the stated "Unit Price" on account of a past debt.

7. No broker's memoranda of sale were issued as to any of the shipments ivolved herein.

8. The informal complaint was filed on January 14, 1982, which was within nine months of when the cause of action stated herein accrued.

Sandler, 32 Agric. Dec. 702 (1973). The only proof offered by plainant is its undated invoices addressed to respondent. I there, complainant argues that, since respondent received the voices and did not contact complainant to raise objection to the such failure to object was proof of the contractual relationship tween the parties. However, while it is true that an invoice fr which a buyer has failed to object may serve as proof of a specif contractual provision, *Casey* v. *Albanese*, 31 Agric. Dec. 311 (1972 an invoice may not serve as proof of the existence of a contra when the alleged buyer, as here, denies the existence of any con tractual arrangement at all.

Other evidence also mandates against a decision in complainant's favor. There is no evidence that complainant sent out a timely billing to respondent for each of the shipments. Complainant only says it sent out the undated invoices to respondent "three or four days after shipment." Respondent, however, says it did not receive any invoice from complainant until at least September 15, 1981, but not later than October 16, 1981. As noted in finding of fact 5, by September 15, 1981, respondent had already paid Mr. Danilson $2,731.50 for 601 cartons of cabbage. After receiving complainant's invoices, respondent questioned Mr. Danilson and was told that he (Mr. Danilson) had already been billed by complainant, and to ignore them. Since respondent believed it was dealing with Mr. Danilson as a principal, it had no other obligation, and was correct when it paid Mr. Danilson for all the cabbage it had received from him.

Other facts which go against complainant are that it apparently billed Mr. Danilson for the cabbage, and that Mr. Danilson did not issue any broker's memoranda of sale. If Mr. Danilson was a broker as to these transactions as claimed by complainant, this could have been proven by such memoranda. Cf. *Royal Packing Co.* v. *Grand Pr. Prod. Brokerage*, 34 Agric. Dec. 1743 (1975): wherein a respondent broker who was alleged to be a buyer had issued broker's memoranda and was held to be a broker and not a buyer. Moreover, copies of written requests for such memoranda from complainant would have served as proof that complainant really believed that Mr. Danilson was acting as a broker. Since there is no such evidence, but there is evidence that complainant billed Mr. Danilson as a buyer, we cannot hold that he acted as a broker in these transactions.

Moreover, complainant
the

produce in 4 of the 5.[1] It is noted that the fifth load was to be delivered to five different addresses. Such a happenstance is not only not inconsistent with Mr. Danilson's being considered the principal in the transactions with complainant, but rather is indicative of it because it makes it more likely that the "consignee" named on the bill of lading (Mr. Danilson) was the buyer rather than anyof the places where a portion of the load was to be delivered.

Furthermore, while complainant only shipped 1,100 cartons of cabbages, respondent received 1,301 cartons of cabbage from Mr. Danilson. The conclusion which must be drawn from this is that Mr. Danilson was buying cabbage from sources other than complainant for resale to respondent, and was respondent's principal as to all these transactions.

We are not sure why Mr. Danilson entered "del for Cook Sales Co." on 5 of the 7 invoices he sent to respondent with the cabbage shipments, but even if this should have put respondent on notice, its obligation was satisfied by its questioning of the person it believed to be its seller, Mr. Danilson. The fact that respondent paid Mr. Danilson, in full, for the 1,301 cartons of cabbage it purchased from him is evidence that respondent believed Mr. Danilson was its seller.

On the basis of all of the evidence in the record we cannot hold that complainant satisfied its burden of proof that there was a contractual relationship between it and respondent. Accordingly, the complaint should be dismissed. *Royal Packing Co. v. Prairie Prod. Brokerage*, 34 Agric. Dec. 1600 (1975).

ORDER

The complaint is dismissed.

Copies of this order shall be served on the parties.

(No. 22,502)

SAN JOAQUIN VALLEY VEGETABLE CO. *v.* JOSEPH KALLISH d/b/a I. KALLISH & SONS. PACA Docket No. 2-5906. Decided April 22, 1983.

Delivered sale—Failure to make adequate tender of delivery—Complaint dismissed

would be later in the day before respondent could unload the truck. The truck driver then took the truck away and disposed of the onions without authority to do so. It is found that there was no acceptance and no wrongful rejection of the produce by respondent. The carrier, acting as complainant's agent, failed to make an adequate tender of delivery and the subsequent wrongful conversion of the onions by the carrier falls upon the complainant since the onions were sold on a delivered basis. The complaint was therefore dismissed.

George S. Whitten, Presiding Officer.

George K. Gibson, Stockton, California, for complainant.

William J. Farr, Springfield, Pennsylvania, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of $8,030.00 against respondent in connection with a transaction in interstate commerce involving the sale of one truck load of yellow onions.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

Although the amount claimed as damage in the formal complaint exceeds $3,000.00, the parties waived oral hearing and the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified complaint is considered a part of the evidence, as is the Department's report of investigation. The answer, since it was not verified, is not a part of the evidence herein. In addition, the parties were given the opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, San Joaquin Valley Vegetable Co., Inc., is a corporation whose address is P.O. Box 9180, Stockton, California.

2. Respondent, Joseph Kalliat

3. On or about June 20, 1981, complainant sold to respondent 803 sacks of U.S. No. 1 Yellow Globe onions, 3 inches and larger, with 75 percent, 3½ inches and larger, in new branded mesh sacks on a delivered basis with a price to be determined after arrival.

4. The onions were shipped on June 20, 1981, from Stockton, California, to respondent in Philadelphia, Pennsylvania, in a truck operated by Clifton Trucking Company, P.O. Box 1391, Secaucus, New Jersey.

5. The contract between complainant and respondent was negotiated through C.H. Robinson Co., a broker.

6. The truck arrived at approximately 6:30 a.m. on June 25, 1981, at respondent's place of business in Philadelphia, Pennsylvania. At that time, the driver of the truck approached Joseph Kallish and asked that the truck be unloaded. Mr. Kallish informed the truck driver that the truck could not be unloaded at that time because all of the unloading spaces were occupied by trucks picking up merchandise which had been sold. Mr. Kallish advised the driver that it might be very late in the day before the truck would be unloaded since available space in the store was occupied by other onions which had to be delivered. The truck driver then took the truck away and disposed of the onions without authority from either complainant, respondent or the broker. No accounting has been made by the the trucking company for the onions.

7. The formal complaint was filed on October 1, 1981, which was within nine months after the cause of action alleged herein accrued.

CONCLUSIONS

Complainant alleges in its statement in reply that respondent "failed to properly file an answer with the Secretary of Agriculture in this case pursuant to section 47.8, and has therefore admitted all the facts alleged in [the] complaint." For this reason complainant restricted its statement in reply principally to the issue of damages. Complainant is mistaken in concluding that respondent did not file an answer in this proceeding. Respondent filed a timely answer on December 18, 1981, and a copy of such answer was served upon complainant's counsel on December 28, 1981. On January 8, 1982, the presiding officer, who was then handling the case, returned a copy of respondent's answer to respondent in order that it might be verified so as to be considered as evidence in the proceeding pursu-

dent is a completely valid answer in that it serves to join the issues between the parties. In no way has respondent failed to file an answer as contemplated by section 47.8(c) of the Rules of Practice.

Although respondent did not file a verified answer, he did file an answering statement which was verified and which constitutes an evidentiary submission in this proceeding. Attached to, and made a part of such answering statement was a counterclaim. The Rules of Practice clearly contemplate that a counterclaim be filed with the answer (see 7 CFR 47.9) and accordingly respondent's counterclaim was not timely filed and is not deemed to constitute a valid counterclaim in this proceeding.

Complainant alleges in its formal complaint that the sale of the onions to respondent was made on a f.o.b. basis for an agreed price of $10.00 per sack. Complainant asserts that these allegations concerning the nature of the sale are supported by its "Confirmation of Purchase and Sale", attached as an exhibit to the formal complaint. Such confirmation does show a sale for a price of $10.00 per sack on a f.o.b. basis. However, the confirmation is dated July 1, 1981, or approximately 5 days after the dispute relative to the subject load of onions arose. The broker's memorandum of sale issued at the time the contract was enteree into, by C.H. Robinson Co., shows that the sale was on a delivered basis with price to be determined after arrival. This conforms with the assertions made by respondent in his sworn answering statement. In its later submission, complainant appears to be relying upon the absence of an immediate written protest to its confirmation of purchase and sale, rather than upon a contention that the confirmation accurately reflects the original contract between the parties. Respondent, however, denies receiving complainant's confirmation of purchase and sale, and complainant did not submit an affidavit by the person who placed such confirmation in the mail. We conclude that the subject onions were sold on a delivered basis with price to be determined after arrival.

The only evidence of record by a direct participant in the events which occurred when the truck arrived at respondent's place of business is the sworn statement by Joseph Kallish, submitted as respondent's answering statement. Mr. Kallish's account of what happened is as follows:

> 5. On the morning of June 25, 1981, at approximately 6:30 a.m. a driver approached me on the platform of my store [illegible] me that he had a load

the unloading spaces were occupied by trucks picking up merchandise which had been sold. It was necessary to wait until the merchandise in the store was delivered to make room for any other onions to be delivered. I advised the driver that it may be very late in the day before the truck would be unloaded as we didn't have much space in the store.

6. At that point, the driver threatened to kick the hell out of me. I then told the driver that I was not going to unload the onions that morning and that was final. The driver left and neither the truck nor the driver ever returned to our store. * * *.

Mr. Kallish goes on to state that Darryl L. Harper of C.H. Robinson Co. came by at approximately 9:00 a.m. on the morning of June 25, 1981, and informed Mr. Kallish that he had contacted Jim Lyons of C.H. Robinson Co. and that Jim Lyons had arranged to have the onions unloaded at Quaker City Produce. In a letter which was not sworn to, and which was included as an exhibit to the Department's report of investigation, James P. Lyons of C.H. Robinson Co. advised that he had made arrangements with Quaker City Produce Co. of Philadelphia to unload the onions and had notified complainant as to where the truck should be unloaded and advised complainant to call the truck broker and inform such truck broker as to the place where the onions should be unloaded. Repondent submitted an unsworn statement by James P. Storey, Jr., f Quaker City Produce Co. as an exhibit to respondent's answering tatement. Mr. Storey stated that he was contacted at approxiately 10:00 a.m. on the morning of June 25, 1981, by Jim Lyons of .H. Robinson Co. and agreed to take the onions. Mr. Storey furer stated that the onions were never delivered to his place of busiess and that, although on both June 25, and June 26, he personally ove around the market and to a near-by truck stop, he was unable locate the truck load of onions.

The basic question remaining for decision is who, as between comainant and respondent, should bear the burden of the financial s resulting from the wrongful conversion of the subject onions by truck driver or trucking company. Fortunately, both the Unim Commercial Code and the Department's Regulations resolve s issue. Section 2–507 of the Uniform Commercial Code provides relevant part that:

Section 2–509 of the Uniform Commercial Code relates to the subject of when risk of loss passes to a buyer in the absence of any breach of contract. The relevant provisions of such section, which relate to a delivered sale contract, state in part as follows:

> Where the contract requires or authorizes the seller to ship the goods by carrier . . . if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery. (U.C.C. § 2–509(1)(b)).

Obviously, it is crucial to a determination of the dispute between the parties in this case that we ascertain what is meant by tender of delivery. The section of the Code dealing with tender of delivery sets forth the requirements for tender in a delivered sale as follows:

> Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this Article, and in particular (a) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; . . . U.C.C. § 2–503(1).

To determine the period of time "reasonably necessary to enable the buyer to take possession" we need only refer to the Department's Regulations. Such Regulations define "reject without reasonable cause" as meaning "refusing or failing without legal justification to accept produce within a reasonable time" (7 CFR § 46.2(bb)). Although the respondent communicated to the trucker his intention of not unloading the truck that morning, it is evident that the reasonable period during which acceptance could take place extended well into the afternoon of June 25, 1981.[1] (See 7 CFR § 46.2(cc)).

It should be noted that if this shipment had been made on a f.o.b. basis, even though the same reasonable period for acceptance would apply, the financial loss resulting from a wrongful conversion of the produce by the carrier would fall upon the receiver rather than

upon the shipper, since any loss in transit after delivery of the goods to the carrier by the shipper at shipping point falls upon a buyer in an f.o.b. sale. In such case the carrier is viewed as the agent of the buyer from the time of the loading of the goods until such goods are off-loaded. Such a case falls under U.C.C. § 2–504 and § 2–509(1)(a) rather than under § 2–509(1)(b).[2]

In summary we find that there was no acceptance by respondent of the subject produce and also no wrongful rejection of such produce by the respondent. The carrier, acting as complainant's agent, failed to make an adequate tender of delivery of the onions and the subsequent wrongful conversion of such onions by the carrier falls upon complainant since the onions were sold on a delivered basis. The complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

(No. 22,503)

LAMANTIA-CULLUM-COLLIER ENTERPRISES, INC. *v.* SYNDEX CORP. a/t/a SCHOENMANN PRODUCE COMPANY. PACA Docket No. 2–6014. Decided April 22, 1983.

Delivered sale—Warranty of merchantability—Damages—Wrongful rejection—Reparation awarded

Complainant sold one truckload of onions on a delivered basis to respondent which were delivered in three drops to respondent's three customers. The first two drops were received and accepted the third drop was rejected, however all were delayed in delivery contrary to a term of the contract. Respondent had no dispute regarding the first drop. Respondent suffered damages due to violation of the warranty of merchantability on the second drop. The third drop was wrongfully rejected. Reparation was awarded to complainant.

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[2] In a f.o.b. sale "tender", in the sense in which the word is used in the U.C.C., is accomplished by compliance with U.C.C. § 2-504 (chiefly, delivery to the carrier at shipping point). It is evident from a comparison of U.C.C. § 2-503(1), (2) and (3) that the tender spoken of in § 2-503(1) is meant to refer to tender in a delivered sale. However the opportunity for acceptance or rejection is present at destination

Andrew Y. Stanton, Presiding Officer.
Complainant and respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $6,875.00 in connection with the sale and shipment of onions in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting liability for $4,682.50, but denying liability for the remainder.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given an opportunity to file additional evidence in the form of verified statements and to file briefs, but declined to do so.

FINDINGS OF FACT

1. Complainant, LaMantia-Cullum-Collier Enterprises, Inc., is a corporation whose address is P.O. Box 974, Weslaco, Texas.

2. Respondent, Syndex Corp. a/t/a Schoenmann Produce Company, is a corporation whose address is 3173 Produce Row, Houston, Texas. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately June 24, 1981, complainant, by oral contract, sold to respondent one truckload of onions, to be shipped to respondent's three customers, Southern Supermarket Services, Inc., Lafayette, Louisiana (hereinafter "Southern"), LeBlanc Wholesale & Produce Co., Inc., Lafayette, Louisiana (hereinafter "LeBlanc"), and DiVincente Bros., Inc., Baton Rouge, Louisiana (hereinafter, "DiVincente"). Southern was to get 500 sacks of medium onions at $6.85 per sack delivered
age, or $2,500.00.

sacks of jumbo onions at $8.85 per sack, delivered, plus $.15 per sack brokerage, or $1,350.00, for a total contract price of $6,875.00. Sou-Tex Produce Distributors, Inc., McAllen, Texas, acted as the broker.

4. At the time the contract was entered into on June 24, 1981, Pat Tankersley, President of Sou-Tex Produce Distributors, Inc., acted as the conduit through which the parties communicated with each other. Tankersley informed complainant's salesman, Sam Henderson, that the load must be delivered to Southern, the first drop, before noon the following day, Thursday, June 25, 1981. Henderson agreed to this condition.

5. Complainant shipped the onions on its truck from its place of business, in interstate commerce to Southern, where it arrived on Friday, June 26, 1981. However, Southern's produce warehouse was closed and Southern refused to unload the truck. Tankersley then asked Henderson to make the second and third drops to the other two receivers that same day, June 26, 1981, and return to Southern on Sunday, June 28, 1981, the next day that Southern's produce warehouse would be open. Henderson agreed to this procedure.

6. On Saturday, June 27, 1981, respondent told Tankersley that neither LeBlanc nor DiVincente had received their onions the previous day. Tankersley then contacted Henderson, who agreed to make delivery to LeBlanc immediately. Shortly thereafter, Henderson told Tankersley that delivery would not be made that day, but that the truck would be at Southern the following day, June 28, 1981.

7. The onions were delivered on June 28, 1981, to Southern, which accepted them.

8. On June 29, 1981, the truck arrived at LeBlanc, was unloaded, and subjected to a federal inspection, which revealed as follows, in pertinent part:

WHERE INSPECTED Receiver's Whse.

Products Inspected: Yellow Bermuda-Granex-Grano type Onions in open mesh sacks branded "Sugar Sweet Brand Texas Onions, LaMantia-Cullum-Collier Company, Inc., Weslaco, Texas, 50 Lbs. Net. Applicant states 275 sacks.

to 32%, average 21%, mostly in early, some in advanced stages affecting 1 to 2 outer scales.

Remarks: Applicant states above lot received by truck.

LeBlanc eventually paid respondent $4.30 per sack, or $1,182.50.

9. On June 29, 1981, after delivery had been made to LeBlanc, the truck arrived at the place of business of DiVincente and, while still on board the truck, the onions were federally inspected with the following results, in pertinent part:

TRAILER LIC. 12753 Kan

. . .

Condition of Tra: Front and rear vents open.

Products Inspected: Yellow Bermuda-Granex-Grano type Onions in open mesh sacks branded "Sugar Sweet Brand Texas Onions, LaMantia-Cullum-Collier & Co., Inc., Weslaco, Texas, 50 Lbs. Net." Applicant states 150 sacks.

Condition of Load: Trailer mostly unloaded, 2 complete and 2 partial stacks lengthwise and crosswise, 5 and 6 rows 1 to 8 layers.

Temperature of Product: Near front: Top 85°F, Bottom, 87°F.

Condition: Mostly firm and fairly dry. Bacterial Soft Rot from 10 to 26%, average 19%, mostly in early some in advanced stages affecting from 1 to 2 outer scales.

Remarks: Inspection and certificate restricted to product remaining in trailer at time of inspection.

After the inspection, DiVincente rejected the onions, and complainant shipped them elsewhere.

10. On July 30, 1981, respondent submitted to the Department its check for $4,682.50, indicating that the check constituted full and final payment for the load of onions. Complainant refused to accept the check.

11. A formal complaint was filed on December 24, 1981, which was within nine months from the time the cause of action herein accrued.

dent's three customers. Respondent does not deny accepting the onions delivered to two of the customers, Southern and LeBlanc. Respondent contends that it owes less than the contract price for the onions delivered to LeBlanc due to their poor condition. Respondent alleges that the onions shipped to its third cutomer, DiVincente, were also in poor condition, which led to DiVincente rejecting them. Complainant does not deny that DiVincente rejected the onions, but asserts that such rejection was unjustified.

As respondent has no dispute regarding the onions delivered to Southern, it is liable to complainant for the contract price of $3,500.00.

The onions delivered to LeBlanc were unloaded upon arrival and thus accepted. Respondent, having accepted the onions, is liable for the contract price of $2,025.00, less damages resulting from any breach of warranty on the part of complainant. Implicit in every contract of purchase and sale of produce is a warranty that the goods shipped must be of merchantable quality. *Malitos Rolling Hills Orchards* v. *Ft. Wayne Produce Company*, 37 A.D. 211 (1978); U.C.C. § 2–314. This means that the seller warrants that the produce, at the time of delivery, will be of "fair to average quality" which includes condition when used in connection with articles subject to deterioration such as fruits and vegetables. *Royal Packing Co.* v. *Quaker City Produce Company*, 37 A.D. 1486 (1978). The inspection which took place at LeBlanc's warehouse on June 29, 1981 (Finding of Fact 8), shows clearly that the onions were not merchantable upon arrival, due to excessive decay.

Since this was a delivered sale, complainant, the seller, assumed all risk in transit, including decay, not caused by the buyer. 7 CFR 46.43(p). Complainant argues that any excessive decay was respondent's fault, as respondent's first receiver, Southern, should have received and accepted the onions when the truck initially arrived on Friday, June 26, 1981. However, complainant claims that Southern was not willing to unload the onions at that time and, as a result, delivery to Southern could not be made until Sunday, June 28, 1981. This caused delivery to LeBlanc to be delayed until Monday, June 29, 1981. In response to complainant's argument, respondent contends that the contract expressly provided that delivery to Southern would have to occur before noon on Thursday, June 25, 1981.

fore noon on June 25, 1981 (Finding of Fact 4). Tankersley also states that, after hearing from Henderson on June 26, 1981, that the truck had just arrived at Southern but that Southern's produce warehouse was closed, he told Henderson to send the truck immediately to LeBlanc and DiVincente, drop off the appropriate quantity of onions, and return to Southern on Sunday, June 28, 1981, to which Henderson agreed (Finding of Fact 5). Tankersley says further that, upon learning from respondent that neither LeBlanc nor DiVincente had received the produce as of Saturday, June 27, 1981, he told Henderson to make delivery that same day, and Henderson agreed to do so. Tankersley, representing the broker, has no apparant interest or bias and his testimony is, therefore, worthy of substantial weight. We conclude that the delay in delivery was entirely the fault of complainant, as its truck arrived late at Southern, contrary to a term of the contract, and it did not make delivery to LeBlanc and DiVincente in accordance with Tankersley's instructions.

Respondent's damages for complainant's violation of the warranty of merchantability regarding the onions delivered to LeBlanc are the difference, at the time and place of acceptance, between the actual value of the onions and the value if they had been as warranted. The actual value of the accepted onions may be measured by the proceeds of a prompt and proper resale. The value of the onions if they had been as warranted is determined by the market price of such onions at the time and place of acceptance, as set forth in the appropriate Market News Service Reports. *Royal Packing Co. v. Quaker City Produce Company, supra.* Considering the nature and extent of the decay revealed by the June 29, 1981, inspection (Finding of Fact 8), we find the payment to respondent from LeBlanc of $4.30 per sack, or $1,182.50, as evidence of a prompt and proper resale on the part of respondent. According to the Market News Service Reports for New Orleans, Louisiana on June 26, 1981, the location and date closest to the place and time of acceptance for which listings are available, the market price for the 50 sacks of jumbo onions was $15.00 per sack, or $750.00, and for the 225 sacks of medium onions, $10.00 to $12.00 per sack, or $2,250.00, utilizing the lower of the two prices, for a total of $3,000.00. Respondent's damages for the onions accepted by LeBlanc were, thus, $3,000.00 [illegible]

ties tendered for delivery on a single contract, is not permissible. Such commercial unit must be accepted or rejected in its entirety. 7 CFR 46.43(ii). We, therefore, consider the onions to have been wrongfully rejected. Complainant claims that it is owed the entire contract price for these 150 sacks. In order to prevail, complainant must show that it was unable to resell the wrongfully rejected onions at a reasonable price after having made a reasonable effort to do so, or that such an effort would have been futile. *Lee Bros.* v. *Smilen Bros.*, 30 A.D. 903 (1971); U.C.C. § 2–709. Although the record does not reflect what complainant did with the 150 sacks of onions, we can assume from the June 29, 1981, inspection report (Finding of Fact 9) that they were sufficiently deteriorated so as to lack commercial value and make resale not feasible. Therefore, complainant is entitled to the contract price of $1,350.00.

In summary, we have held that respondent is liable to complaint for $3,500.00 for the onions shipped to Southern, $207.50 for the onions shipped to LeBlanc, and $1,350.00 for the onions shipped to DiVincente, for a total of $5,057.50. Respondent submitted to the Department on July 30, 1981, a check to complainant for $4,682.50, offered with the condition that acceptance would constitute full and final payment. Complainant rejected the check. Therefore, respondent is still liable to complainant for $5,057.50, and its failure to pay such sum to complainant is a violation of section 2 of the Act for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $5,057.50, with interest thereon at the rate of 13% per annum from August 1, 1981, until paid.

Copies of this order shall be served upon the parties.

(No. 22,504)

JOHN LIVACICH PRODUCE, INC. a/t/a VISTA SALES *v.* THE AUSTER COMPANY, INC. PACA Docket No. 2–6056. Decided April 22, 1983.

Consignment—Breach of duty—Reparation awarded

Andrew Y. Stanton, Presiding Officer.
Matthew McInerney, Newport Beach, California, for complainant.
Max & Herman Chill, Chicago, Illinois, for respondent

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $13,667.50 in connection with a shipment of tomatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, who filed an answer thereto, denying liability to complainant.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, complainant filed an opening statement. Both parties filed briefs.

FINDINGS OF FACT

1. Complainant, John Livacich Produce, Inc. a/t/a Vista Sales, is a corporation whose address is 2231 Willow Brook Drive, Vista, California.

2. Respondent, The Auster Company, Inc., is a corporation whose address is 51 So. Water Market, Chicago, Illinois. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On November 9, 1981, complainant sold to respondent, pursuant to oral contract, 2,496 flats of cherry tomatoes on what they described as a deferred billing basis. The parties actually intended that the transaction be treated as a consignment. John Rothstein, Nogales, Arizona, acted as the broker, through whom both parties communicated.

4. On November 9, 1981, a truckload of cherry tomatoes was shipped from complainant's place of business in interstate commerce to the place of business of respondent [illegible]

dent's sales of the subject tomatoes. After a week to ten days, respondent's salesman, Joe Auster, informed Rothstein that the tomatoes were averaging $5.00 to $6.00 per flat, and all but 360 flats had been sold. Rothstein conveyed this information to complainant.

6. Approximately two weeks after respondent had told Rothstein that only 360 flats were left to be sold, respondent reported to Rothstein that it still had half the load on hand and was going to dump most of it. Respondent advised that the average return for the tomatoes would be approximately $.60 per flat. This was the first time respondent had informed Rothstein of its purported inability to sell part of the load. Rothstein transmitted this information to complainant.

7. On December 2, 1981, respondent obtained a federal inspection of cherry tomatoes, and the following inspection report was prepared, in pertinent part:

MARKET Chicago, Illinois
DATE December 2, 1981
HOUR 12:15 P.M.
APPLICANT The Auster Company
ADDRESS Chicago, Illinois
RECEIVER The Auster Company
ADDRESS Chicago, Illinois
SHIPPER John Rothstein
ADDRESS California
WHERE INSPECTED 51 S. Water Market
. . .Products Inspected: CHERRY TOMATOES in pint containers placed in cardboard type printed "12-1 Dry Pints" and to denote various brands. Packers and Growers. Inspector's count 896 lugs.

Condition of Load: Stacked on pallets in applicant's cooler.

Condition of Pack: Well filled.

Temperature of Product: In various lugs 30°F.

Condition: Average approximately 30% red. Decay ranges 10 to 100%, average 68%, Rhizopus Rot in advanced

8. On December 22, 1981, respondent prepared an account of sales, which was eventually sent to complainant. The account of sales indicated as follows, in pertinent part:

Quantity	Price	Extension
802	$ 0.00	$0.00
1	.05	.05
25	.20	5.00
95	.21	19.95
50	.25	12.50
52	.50	26.00
106	.75	79.50
122	1 00	122.00
50	1.50	75.00
23	2.00	46.00
101	2.50	252.52
140	3.00	420.00
4	3.50	14.00
568	4.00	2,272.00
146	4.50	657.00
16	4.75	76.00
195	5.00	975.00
2,496 Total		$5,052.00 Total

Statement of Sales	
Cost	.00
Freight	$1,800.00
Unloading	.00
Terminal	.00
Demurrage	.00
Repacking	.00
Dumped	.00
Storage	.00
In-cartage	.00
Out-cartage	.00
Inspection	32.00
Commission	.00
Handling	1,497.60
Final Total:	$1,722.90

9. According to the Market News Service Reports for Chicago, Illinois, California cherry tomatoes were selling for $7.50 to $8.00 per flat, $4.00 to $6.00 per flat if in fair condition, on November 12 and 13, 1981.

10. Respondent has paid complainant $1,722.90 which was accepted without

CONCLUSIONS

This case involves 2,496 flats of cherry tomatoes sold by complainant to respondent through a broker, John Rothstein, Nogales, Arizona, on a "deferred billing" basis, to be handled by respondent for complainant's account. Complainant claims that the tomatoes were improperly handled by respondent, as they should have sold for far more than the amount reported by respondent. Complainant also claims that it was misinformed by respondent as to the course of the sales. Respondent denies these allegations and claims that its difficulty in selling the tomatoes was caused by the fact that complainant's large quantity of tomatoes, in only fair condition, were offered for sale on a declining market. Respondent asserts that its salesman, Joe Auster, warned the broker of these problems at the time the contract was agreed to.

Although the parties characterize their transaction as a "deferred billing" sale, they have, throughout, treated it as a consignment, and it will thus be considered a consignment for the purpose of this decision. Since respondent was handling the tomatoes on consignment, it was obliged to adhere to the requirements of section 46.29(a) of the Department's regulations (7 CFR 46.29(a)), which states as follows, in pertinent part:

> It is a violation of section 2 of the act to fail to render true and correct accountings in connection with consignments or produce handled on joint account. Charges which cannot be supported by proper evidence in the records of the commission merchant or joint account partner cannot be deducted. The commission merchant or joint account partner may be held liable for any financial loss and for other penalties provided by the act, due to his negligence or failure to perform any specification or duty, express or implied, arising out of any transaction subject to the act.

One implied duty had by respondent, as a consignee, was to keep complainant, its consignor, fully informed of developments in connection with the consignment transaction. This allows the consignor the option of retrieving the consigned goods and disposing of them elsewhere if it believes it can obtain a better return for the

duty as a consignee, has the burden of proving its allegations by a preponderance of the evidence. *Pacific Fruit and Produce Co.* v. *Wm. C. Denny, Inc.*, 31 A.D. 1420 (1972).

Complainant's claim of improper handling is supported by the Chicago Market News Service Reports for the date of delivery of the tomatoes, which, considering the average travel time from California to Chicago, was November 12, 1981. These listings show California cherry tomatoes, in good condition, bringing prices ranging from $7.50 to $8.00 per flat (Finding of Fact 9). Respondent urges us to disregard the Market News Service Reports listings, but has not presented any valid reason why we should do so. We have no basis to assume the tomatoes were in only fair condition, as asserted by respondent, since respondent did not secure an inspection at the time of delivery. Respondent has introduced a December 2, 1981, federal inspection report covering a quantity of cherry tomatoes, but there is no indication from such report that the inspected tomatoes were part of the load shipped by complainant in the instant transaction. Even if they were the same tomatoes, the condition revealed by the inspection report does not prove that the tomatoes were not in good condition when they reached Chicago on November 12, 1981, some 20 days earlier. Respondent's claim that its salesman, Joe Auster, told the broker at the time of contracting that the tomatoes would be difficult to sell is not confirmed by the broker. However, even if it were true, the Market News Service Reports listings show clearly that a market for such tomatoes was available, with prices much higher than those allegedly obtained by respondent.

Respondent's breach of duty in handling the consigned tomatoes is also evidenced by its failure to keep complainant fully informed as to the nature of the tomato sales. This is apparent from a letter of the broker to the Department, received on February 2, 1982. Since the broker has not been shown to have any interest or bias in the proceeding, his version of events is entitled to great weight. The broker states that, about a week to ten days after delivery, Joe Auster of respondent told him that sales were averaging $5.00 to $6.00 per flat, and that only 360 flats remained to be sold. Two weeks later, respondent informed the broker that half the load would have to be dumped, and that the returns would
$ 60 per flat.

Finally, it must be noted that even if we were to hold that there was no breach of duty by respondent, we would not accept respondent's assertion that it dumped 802 flats of cherry tomatoes. Section 46.23 of the regulations (7 CFR 46.23) states that:

> When produce is being handled for or on behalf of another person, proof as to the quantities of produce destroyed or dumped in excess of 5% of the shipment shall be provided by procuring an official certificate showing that the produce has no commercial value from any person authorized by the Department to inspect fruits and vegetables.

Since the quantity allegedly dumped far exceeds 5% of the load, and respondent obtained no dump certificate, respondent's claim of dumping must be disallowed.

We have determined that respondent breached its duty to complainant by improperly handling the tomatoes, as evidenced by its failure to sell them at the available market price and its failure to keep complainant fully informed as to the course of their sales. Therefore, as previously stated, respondent is liable for the resulting loss. This is determined by the market price of similar cherry tomatoes listed in the Market News Service Reports for the date of delivery, November 12, 1981, utilizing the lower of the two prices listed for cherry tomatoes in good condition on that date, or $7.50 per flat (Finding of Fact 9). Therefore, the 2,496 flats should have been sold for $18,720.00. From this figure we will deduct the $1,800.00 claimed by respondent for freight. The $32.00 claimed for inspection is not allowable. The $1,497.60 which respondent has charged for handling is reasonable. Respondent should thus have remitted to complainant $18,720.00, less $1,800.00 freight and $1,497.60 handling, or $15,422.40. Respondent has already paid $1,722.90. Respondent is thus liable to complainant for $13,699.50, and its failure to remit such amount is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $13,699.50, with interest thereon at the rate of 13% per annum from December 1, 1981, until paid.

[illegible] order shall be served upon the parties.

(No. 22,505)

FRUIT SALAD, INC. *v.* M. EGAN CO., INC. PACA Docket No. 2-6112. Decided April 22, 1983.

Acceptance—Failure to pay full purchase price—Reparation awarded

Complainant shipped various quantities of fruit sections to respondent who received and accepted the shipments. There being no indication that there has been any payment to complainant by respondent, it is found that respondent is liable to complainant for the full purchase price. Therefore, reparation is awarded to complainant.

George S. Whitten, Presiding Officer.
Complainant, *pro se*
Joseph S. Carges, Rochester, New York, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $3,617.50 in connection with the sale of six lots of fruit sections in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, and an answer was filed by Joseph S. Carges, assignee for respondent, which did not respond to the particular allegations of the complaint, but stated that respondent had filed "A General Assignment for the Benefit of Creditors on June 29, 1982 in compliance with the debtor creditor laws." Such response to the complaint also stated "this is also to advise you that Fruit Salad Inc., of Lawrence, MA has filed their claim directly with me as assignee and such was filed on August 9, 1982 in the amount of $3,617.50."

The amount claimed as damages in the complaint does not exceed $15,000.00, and the shortened method of procedure set forth in the Rules of Practice (7 CFR 47.20) is, therefore, applicable. Under this procedure the verified complaint is considered a part of the evidence herein, as is the Department's report of investigation and answer, since it

FINDINGS OF FACT

1. Complainant, Fruit Salad, Inc., is a corporation whose address is 274 Prospect Street, Lawrence, Massachusetts.

2. Respondent, M. Egan Co., Inc., is a corporation whose address is 920 Exchange Street, Rochester, New York. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about March 31, April 19, May 4, 12, 25, and June 9, 1982, complainant sold to respondent, and shipped from its place of business in Lawrence, Masschusetts, to respondent in Rochester, New York, various quantities of fruit sections, a perishable agricultural commodity, having invoice prices totalling $3,617.50.

4. The product covered by finding of fact 3 was received and accepted by respondent, and respondent has not paid complainant any part of the purchase price thereof.

5. The formal complainant was filed on July 15, 1982, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

The only defense raised by respondent in connection with complainant's claim herein is that raised by respondent's assignee as set forth in the preliminary statement above. The answer to this defense is succinctly set forth in a letter from the Presiding Officer to respondent and respondent's assignee, dated October 26, 1982, which states in relevant party as follows:

> . . . the filing of a General Assignment does not automatically cut off the rights of parties to proceed before the Secretary in a reparation proceeding. Moreover, such right to proceed also is not necessarily cut off by the filing of a claim with the Assignee. However, if a complainant accepted an Assignee's payment in full satisfaction of an Assignor's indebtness, we would deem such acceptance as an accord and satisfaction.
>
> Furthermore, it is noted that a reparation order issued by the Secretary has effects not attendant to any other proceeding. Failure to pay a reparation award results in sanctions against licensees, and those individuals responsibly connected with cor-

thereof, or $3,617.50, and that respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $3,617.50, with interest thereon at the rate of 13 percent per annum from June 1, 1982, until paid

Copies of this order shall be served upon the parties.

(No. 22,506)

GROWERS EXCHANGE, INC. v. CENTRAL CAROLINA GROCERS, INC.
PACA Docket No. 2-6050. Decided April 25, 1983.

F.O.B. Sale—Acceptance—Damages, failure to prove—Suitable shipping condition warranty—Counterclaim—Reparation awarded

Complainant sold and shipped 140 cartons of lettuce to respondent who received and accepted the shipment. Respondent filed a countrclaim stating that they incurred expenses in replacing the lettuce because its customers found severe internal discoloration. Respondent failed to prove damages due to breach of suitable shipping condition warranty because it did not obtain any federal or state inspection when the shipment arrived from complainant. Reparation was awarded to complainant. The counterclaim was dismissed.

Andrew Y. Stanton, Presiding Officer.
Thomas R. Oliveri, Newport Beach, California, for complainant.
Respondent, *pro se*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $1,399.50 in connection with the sale and shipment of lettuce to respondent in interstate commerce.

in connection with the subject matter of the complaint. Complainant filed a reply to the counterclaim, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, complainant filed an opening statement and respondent filed an answering statement. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, Growers Exchange, Inc., is a corporation whose address is P.O. Box 80479, Salinas, California. At the time of the transaction involved herein, complainant was licensed under the Act.

2. Respondent, Central Carolina Grocers, Inc., is a corporation whose address is P.O. Box 687, Kernersville, North Carolina. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately July 29, 1981, complainant sold to respondent, by oral contract, 140 cartons of Toro brand lettuce at $9.00 per carton, plus $.65 per carton cooling, $22.50 for a Ryan recorder, $21.00 brokerage, and $5.00 for a Medfly certificate, totalling $1,399.50, f.o.b. The contract was negotiated by Federated Produce, Inc., Huntington Beach, California, who acted as the broker throughout the transaction.

4. On approximately July 29, 1981, the quantity of lettuce subject to the contract was shipped from complainant's place of business in interstate commerce to that of respondent, where it arrived on approximately August 2, 1981. The lettuce was not subjected to a federal or state inspection upon arrival or at any other time. After arrival, respondent shipped the lettuce to its customers.

5. The Department received a letter from the broker on January 25, 1982, which stated that on approximately August 5, 1981, respondent called the broker and complained that one of its customers did not like the lettuce respondent had purchased from complainant. Respondent claimed that, as a result, it had to replace, at a cost of $1,860.00, all the lettuce sold to that customer, which it had received from complainant pursuant to the transaction at issue herein. Respondent told the broker that it [illegible]

7. Respondent has, to date, failed to pay complainant the contract price of $1,399.50.

8. A formal complaint for $1,399.50 was filed on April 6, 1982, which was within nine months from the time the cause of action herein accrued.

9. A formal counterclaim for $1,860.00, relating to the subject matter of the complaint, was filed on June 11, 1982, which was within nine months from the time the complaint was filed.

CONCLUSIONS

It is agreed that respondent purchased 140 cartons of Toro brand lettuce from complaint on July 29, 1981, for a total f.o.b. price of $1,399.50. It is clear that respondent accepted the lettuce, as respondent admittedly shipped it to its customers upon arrival and, by so doing, exercised dominion over the lettuce. *Mario Saikhon* v. *Russell-Ward Company, Inc.*, 34 A.D. 1940 (1975).

Respondent claims that its customers found the lettuce to have severe internal discoloration, which made it ncessary for respondent to replace the lettuce, thus incurring an expense of $1,860.00. Respondent acknowledged that it did not obtain a federal inspection of the lettuce when it arrived from complainant, but claims that it only secures such inspections when its own visual inspection indicates that problems exist. Respondent claims that a visual inspection could not possibly identify the internal discoloration, as that would require cutting open each head of lettuce.

Since respondent accepted the lettuce in this f.o.b. transaction, it became liable for the contract price, less damages due to any breach of warranty on the part of complainant. Respondent has the burden of proving both the breach and damages by a preponderance of the evidence. *J-B Distribution Company* v. *M. Levin & Co. and J.J. Distributing*, 39 A.D. 713 (1980). Respondent has not provided the results of any federal or state inspection. The only evidence on which it bases its claim of breach of warranty is its own assertion of the internal discoloration allegedly affecting the lettuce. This evidence is obviously self-serving and, thus, not entitled to significant weight. Therefore, respondent has failed to meet its burden of proof. Consequently, there is no basis for respondent's counterclaim, and it must be dismissed.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $1,399.50, with interest thereon at the rate of 13% per annum from September 1, 1981, until paid.

Respondent's counterclaim is hereby dismissed.

Copies of this order shall be served upon the parties.

(No. 22,507)

HORWATH AND CO., INC. a/t/a GONZALES PACKING CO. *v.* A & J PRODUCE CORP. PACA Docket No. 2-6038. Decided April 25, 1983.

F.O.B. Sale—Rejection without reasonable cause—Breach of suitable shipping condition warranty—Complaint dismissed

Complainant sold and shipped 2,176 cartons of green tomatoes to respondent. Upon arrival at respondent's place of business respondent obtained a federal inspection of the tomatoes and the following day rejected the shipment. This rejection was without reasonable cause which constitutes acceptance of the shipment. It was determined however that complainant breached the warranty of suitable shipping condition. The complaint was dismissed because respondent's damages exceeded the contract price.

Edward M. Silverstein, Presiding Officer.
Thomas R. Oliveri, Newport Beach, California, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $6,988.20 in connection with the sale and shipment of tomatoes to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon the parties. A copy of the formal complaint was

FINDINGS OF FACT

1. Complainant, Horwath and Co., Inc. a/t/a Gonzales Packing Co., is a corporation whose address is P.O. Box 58, Gonzales, California.

2. Respondent, A & J Produce Corp., is a corporation whose address is Hunts Point Terminal Market, Room 143, Bronx, New York. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately June 27, 1981, complainant sold to respondent, by oral contract, 2,176 cartons of green tomatoes at $3.00 per carton, plus $.20 per carton palletization and $25.00 for a Ryan recorder, for a total f.o.b. price of $6,988.20. Shipment was to be made by railcar with a temperature of 58°F. maintained during transit. The contract negotiations were made through a broker, Advance Brokerage Inc., Fresno, California.

4. On June 27, 1981, the quantity of tomatoes called for in the contract was shipped by railcar SPFE 450308 from complainant's place of business to that of respondent, and arrived on the morning of July 6, 1981.

5. The Ryan tape shows that a temperature of approximately 58°F. was maintined in the railcar until approximately eight hours before the recording device was turned off, when the temperature gradually rose to about 68°F.

6. Upon arrival at respondent's place of business, the tomatoes, while still on board the railcar, were federally inspected at 7:30 a.m. on July 6, 1981. The inspection report reads as follows, in pertinent part:

NAME AND ADDRESS OF APPLICANT A & J Produce Corporation, Bronx, New York

NAME AND ADDRESS OF SHIPPER Gonzales Packing Company, Gonzales California

NAME AND ADDRESS OF RECEIVER A & J Produce Corporation, Bronx, New York

DATE July 6, 1981

CARRIER . . . [checked] CAR

[checked] LOAD AND CARRIER INTACT

INSPECTION POINT Hunts Point Market, Bronx, New York

[checked] APPLICANTS . . . [checked] SIDING

TEMPERATURE PRODUCT . . . range 67 TO 68°F

PRODUCTS INSPECTED: Tomatoes in cartons branded "5–7–m Tomatoes, net weight 30 lbs., California" and stamped "LG ENG 56A"

APPLICANT STATES: 2176 cartons

CONDITION: Average approximately 55% light red and red. 4 to 12% in most samples, none in some, average 6% soft tomatoes. Decay ranges 6 to 56%, average 39% Watery Rot in various stages. Average 2% very serious damage by numerous slightly sunken discolored areas occurring over shoulders.

Condition of Containers: Many cartons show wet spots from 2 inches to entire bottom wet from juice of decayed tomatoes.

REMARKS: Inspection restricted to doorway area being loaded at time of inspection, 1 complete pallet and 2 incomplete pallets and upper 2 layers of 2 adjacent pallets nearest doors, "B" end of car. Condition only inspection and condition of containers reported at applicant's request.

On July 7, 1981, respondent contacted the broker and the carrier, informing them that respondent was rejecting the tomatoes.

8. In a letter to the Department dated November 27, 1981, filed on December 3, 1981, the broker states that after being informed by respondent on July 7, 1981, of its rejection of the tomatoes, the broker conveyed this information to complainant.

9. A mailgram to the Department by the carrier, Conrail, dated October 1, 1981, purporting to be a confirmation copy of a telegram

10. The tomatoes were not resold but were disposed of by the carrier.

11. Respondent has, to date, failed to pay complainant the contract price of the tomatoes of $6,988.20, which complainant claims to be due and owing.

12. A formal complaint was filed on April 5, 1982, which was within nine months from the time the alleged cause of action herein accrued.

CONCLUSIONS

Respondent contends that it properly rejected the carload of tomatoes due to the extensive decay revealed by the July 6, 1981, federal inspection. Complainant claims that respondent's purported rejection of the carload of tomatoes was without reasonable cause, as the deterioration revealed by the inspection resulted from improper transportation conditions, as indicated by the high pulp temperatures found by such inspection. Complainant claims further that it was not notified of respondent's attempted rejection until months after the transaction occurred.

The first issue is whether respondent rightfully rejected the tomatoes. The Department's regulations, at 7 CFR 46.2(bb)(1), define a rejection without reasonable cause as "refusing or failing without legal justification to reject produce within a reasonable time." This is also considered to constitute acceptance of the produce. See 7 CFR 46.2(dd)(3). A reasonable time, in the case of a rail shipment of fresh fruits and vegetables, as was present here, is considered "not to exceed 24 hours after notice of arrival and the car has been placed in a location where the produce is made accessible for inspection." 7 CFR 46.2(cc)(2). The tomatoes were inspected at 7:30 a.m. on July 6, 1981 (Finding of Fact 6). Respondent must thus have been notified of arrival and the produce made accessible for inspection prior to that time. The carrier, Conrail, states that its telegram to complainant advising of respondent's rejection was sent at 10:25 a.m. on July 7, 1981 (Finding of Fact 9). This is in excess of the 24 hour period referred to in 7 CFR 46.2(cc)(2). The broker claims that it notified complainant of respondent's rejection on July 7, 1981, but does not mention the time of day (Finding of Fact 8). Therefore, we

by complainant. It is respondent's burden to prove the breach and damages by a preponderance of the evidence. *Tony Misita & Sons Produce* v. *Twin City Produce*, 41 A.D. 195 (1982).

As this was a f.o.b. sale, complainant gave a warranty of suitable shipping condition, meaning that at the time of billing, when the produce is loaded at shipping point, it is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the destination agreed to by the parties (7 CFR 46.43(j)). The condition defects revealed by the July 6, 1981, federal inspection, an average of 6% soft, 39% Watery Rot, and 2% serious damages by numerous slightly sunken disclored areas, are extremely severe. The fact that the inspection was restricted does not substantially lessen the degree of deterioration which we can assume was present in the entire car. While the pulp temperatures are slightly elevated, they do not obviate the warranty of suitable shipping condition, since even if temperatures had been normal, the level of deterioration would still have been unacceptably high. In addition, higher pulp temperatures can be expected in produce situated close to the doorway area, which was subjected to the inspection in this case. This does not necessarily mean that such temperatures are present throughout the entire car. Abnormal transportation conditions are also not ev denced by the Ryan recording tape, which shows that the prope 58°F. temperature was maintained throughout the normal nine o ten days of transit, with the exception of the last few hours when the temperature gradually rose to 68°F. We, therefore, conclude that complainant was in breach of warranty.

As respondent's damages, it is entitled to the difference between the value of the tomatoes accepted and their value if they had been as warranted. For the value of the accepted tomatoes, we may use the proceeds of a prompt and proper resale. For the value of the tomatoes if they had been as warranted, we look to the applicable Market News Service Reports for the date and place of acceptance. *Arkansas Tomato Co.* v. *M–K & Sons Produce Co.*, 40 A.D. 1773 (1981). Respondent claims that it turned the tomatoes over to the carrier for disposal and received no proceeds. This claim is supported by the results of the July 6, 1981, inspection, which shows that the tomatoes were virtually worthless. The July 6, 1981, Mow

dent's damages exceed the contract price of $6,988.20, respondent is without any liability. The complaint must, therefore, be dismissed.

ORDER

The complaint is hereby dismissed.
Copies of this order shall be served upon the parties.

MISCELLANEOUS ORDERS ISSUED BY
DONALD A. CAMPBELL, JUDICIAL OFFICER

(No. 22,508)

HOMESTEAD TOMATO PACKING CO., INC. v. BEN E. KEITH COMPANY.
PACA Docket No. 2-5945. Order issued April 5, 1983.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Decision and Order was issued on February 14, 1983, dismissing the complaint. By Petition received March 16, 1983, complainant has moved that this matter be reopened and reconsidered.

Accordingly, the order of February 14, 1983, is hereby stayed.
Copies of this order shall be served upon the parties.

No. 22,509

PRODUCE ASSOCIATES, INC. v. NEW LINDEN PRICE RITE, INC.
PACA Docket No. 2-6154. Order issued April 21, 1983.

ORDER ON RECONSIDERATION

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). An order of dismissal was issued on February 14, 1983, because the parties had previously agreed to a dismissal, with prejudice, of the same cause of action in a New Jersey State court. By letter dated April 8, 1983, and received April 11, 1983, complainant has moved

In any event, the order became final and unappealable in any forum on March 16, 1983, which was 30 days after issuance. *American Fruit Grow.* v. *Lewis D. Goldstein F&P Corp.*, 78 F.Supp. 309 (E.D. Pa. 1948); *Southland Produce Co.* v. *Caamano Brothers Wholesale*, 39 Agric. Dec. 789 (1980).

In view of the above, the petition for reconsideration is denied.

(No. 22,510)

PRODUCE ASSOCIATES, INC. v. SHOP WISE SUPERMARKETS OF CONNECTICUT. PACA Docket No. 2-6139. Order issued April 22, 1983.

ORDER ON RECONSIDERATION

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). An order of dismissal was issued on February 15, 1983, because the parties had previously agreed to a dismissal, with prejudice, of the same cause of action in a New Jersey State court. By letter dated April 8, 1983, and received April 11, 1983, complainant has moved for reconsideration of our Order of Dismissal.

The Rules of Practice governing these proceedings permit petitions for reconsideration to be filed within 10 days after service of an order. The February 15, 1983, order was served on complainant on February 19, 1983. Therefore, the petition for reconsideration was filed 41 days late.

In any event, the order became final and unappealable in any forum on March 17, 1983, which was 30 days after issuance. *American Fruit Grow.* v. *Lewis D. Goldstein F&P Corp.*, 78 F.Supp. 309 (E.D. Pa. 1948); *Southland Produce Co.* v. *Caamano Brothers Wholesale*, 39 Agric. Dec. 789 (1980).

In view of the above, the petition for reconsideration is denied.

REPARATION DEFAULT DECISIONS ISSUED BY
DONALD A. CAMPBELL, JUDICIAL OFFICER

(No. 22,511)

NORTH COUNTY FRUIT SALES INC. *v.* J. R. CORTES & CO. PACA Docket No. RD–83–152. Reparation of $13,177.80 with 13 percent interest from September 1, 1982, awarded complainant against respondent in order issued April 11, 1983.

(No. 22,512)

GRASSO FOODS INC. *v.* CHIPICO PICKLE PRODUCTS INC. PACA Docket No. RD–83–180. Reparation of $52,666.35 with 13 percent interest from August 1, 1982, awarded complainant against respondent in order issued April 11, 1983.

(No. 22,513)

RAY WESTRICK FARMS INC. *v.* THE DAN DEE PRETZEL & POTATO CHIP CO. PACA Docket No. RD–83–205. Reparation of $61,981.61 with 13 percent interest from June 1, 1982, awarded complainant against respondent in order issued April 25, 1983.

(No. 22,514)

O. P. MURPHY PRODUCE COMPANY, INC., a/t/a O. P. MURPHY & SONS *v.* MIDWEST PRODUCE COMPANY, INC. PACA Docket No. RD–83–206. Reparation of $19,269.75 with 13 percent interest from October 1, 1982, awarded complainant against respondent in order issued April 25, 1983.

(No. 22,515)

WEST VALLEY PRODUCE *v.* L & M SCHNEIDER INC. PACA Docket No. RD–83–200. Reparation of $2,160.50 with 13 percent interest from July 1, 1982, awarded complainant against respondent in order issued April 26, 1983.

(No. 22,516)

BUJULIAN BROS., INC. *v.* MONTE BROKERAGE CO. PACA Docket No. RD–83–201. Reparation of $4,986.90 with 13 percent interest from August 1, 1982, awarded complainant against respondent in order issued April 26, 1983.

(No. 22,517)

SIX L'S PACKING COMPANY INC. *v.* TRIPLE A TOMATO INC. PACA Docket No. RD–83–202. Reparation of $36,599.00 with 13 percent interest from August 1, 1982, awarded complainant against respondent in order issued April 26, 1983.

(No. 22,518)

VEG-A-MIX *v.* PALM COAST PRODUCE. PACA Docket No. RD–83–204. Reparation of $1,348.05 with 13 percent interest from August 1, 1982, awarded complainant against respondent in order issued April 26, 1983.

(No. 22,519)

LORAN D. SHEPPARD d/b/a GUY PACKING COMPANY *v.* D. L. FOOD PURVEYORS, INC. a/t/a MDM FOODS. PACA Docket No. RD–83–197. Reparation of $1,747.20 with 13 percent interest from March 1, 1982, awarded complainant against respondent in order issued April 27, 1983.

(No. 22,520)

GOLD BELL, INC. *v.* MARKEN FOOD SERVICE INC. PACA Docket No. RD–83–198. Reparation of $5,267.50 with 13 percent interest from August 1, 1982, awarded complainant against respondent in order issued April 27, 1983.

(No. 22,521)

FRESH WESTERN MARKETING *v.* CUMBERLAND PRODUCE CO. INC. PACA Docket No. RD–83–199. Reparation of $1,810.55 with 13 percent interest from July 1, 1982, awarded complainant against respondent in order issued April 27, 1983.

(No. 22,522)

CASTLE & COOKE, INC. *v.* BUY FRESH PRODUCE, INC. PACA Docket No. RD–83–215. Reparation of $59,758.65 with 13 percent interest from November 1, 1982, awarded complainant against re-

$10,816.50 with 13 percent interest from August 1, 1982, awarded complainant against respondent in order issued April 27, 1983.

(No. 22,524)

BLUE CHELAN, INC. *v.* APPLEX, INC. PACA Docket No. RD–83–207. Reparation of $66,081.00 with 13 percent interest from March 1, 1982, awarded complainant against respondent in order issued April 28, 1983.

(No. 22,525)

MONTEREY BAY PACKING CO. *v.* NORMAN K. MILLER d/b/a M & W PRODUCE. PACA Docket No. RD–83–209. Reparation of $1,147.55 with 13 percent interest from December 1, 1982, awarded complainant against respondent in order issued April 28, 1983.

(No. 22,526)

JERRY PEPELIS PACKING CO. *v.* S. CORTELLO INC. PACA Docket No. RD–83–210 Reparation of $5,652.50 with 13 percent interest from May 1, 1982, awarded complainant against respondent in order issued April 28, 1983.

(No. 22,527)

ROBERT BARTH d/b/a BARTH FARMS *v.* YOUNG SUN YOO d/b/a KOREA FARMS. PACA Docket No. RD–83–211. Reparation of $10,331.15 with 13 percent interest from May 1, 1982, awarded complainant against respondent in order issued April 28, 1983.

(No. 22,528)

MARTIN PRODUCE CO., INC. *v.* MIDWEST PRODUCE COMPANY, INC. PACA Docket No. RD–83–212. Reparation of $2,512.50 with 13 percent interest from December 1, 1982, awarded complainant against respondent in order issued April 28, 1983.

(No. 22,529)

MISCELLANEOUS ORDER ISSUED BY
DONALD A. CAMPBELL, JUDICIAL OFFICER

(No. 22,530)

TOM MOORE COMPANY, INC. *v.* AMIGOMEX, INC. PACA Docket No. RD–83–149. Order issued April 25, 1983.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer, and a Default Order was issued on February 11, 1983. However, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)), and the February 11, 1983, Default Order was stayed, pursuant to a March 11, 1983, Stay Order.

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and respondent is given 10 days from its receipt of this Order in which to file an answer. Failure to submit an answer within the 10 day period will result in the immediate reissuance of the Default Order.

Copies of this order shall be served upon the parties.

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